165-719

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 174.

CLEMENTINE ULMAN, BY HER HUSBAND AND NEXT FRIEND, ALFRED J. ULMAN, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE AND LEWIS N. HOPKINS, CITY COLLECTOR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED SEPTEMBER 25, 1894.

(15,690.)

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1 THE MAYOR AND CITY COUNCIL OF BALTIMORE and Lewis N. Hopkins, City Collector, Appellants, *vs.* CLEMENTINE ULMAN, by Her Husband and Next Friend, ALFRED J. ULMAN. } In the Court of Appeals of Maryland.

(Endorsed:) Mr. Clerk, please file, &c. M. R. Walter, sol. for Clementine Ulman, by her husband and next friend, Alfred J. Ulman.

To the Honorable John M. Robinson, chief judge of the court of appeals of Maryland:

Clementine Ulman, by her husband and next friend, Al-
2 fred J. Ulman, the appellee in the above-entitled cause, respectfully prays your honor to allow a writ of error to the Supreme Court of the United States, to be transmitted to the said court with the record and proceedings in said cause, because she says in said record and proceedings and in the rendition of the order of the court of appeals of Maryland therein error hath happened to the great damage of her, the said Clementine Ulman, there having been drawn in question therein the *the* validity of a statute of and an authority exercised under the State of Maryland, on the ground of their being repugnant to the Constitution of the United States, and the decree of said court of appeals being in favor of such their validity, and there having been drawn in question therein the construction of a clause of the Constitution of the United States, and the decision of said court of appeals being against the title and right specifically set up and claimed under such clause of the said Constitution.

3 And as duty, &c.

M. R. WALTER,
Sol. for Clementine Ulman, by Her Husband and Next Friend, Alfred J. Ulman.

The writ is allowed as prayed.
August 13, 1894.

JNO. M. ROBINSON,
Chief Judge of the Court of Appeals of Maryland.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of Maryland, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Clementine Ulman, by her husband and next

friend, Alfred J. Ulman, and The Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against
5 their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Clementine Ulman, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the
6 Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-fourth day of August, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.] JAS. W. CHEW,
Clerk of the Circuit Court of the United States for the District of Maryland, in the Fourth Circuit.

Allowed by—
JNO. M. ROBINSON,
Chief Judge of the Court of Appeals of Maryland.

7 UNITED STATES OF AMERICA, *ss:*

To the Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of Maryland, wherein Clementine Ulman, by her husband and next friend, Alfred J. Ulman,
8 is plaintiff in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Robinson, chief judge of the court of appeals of Maryland, this 23d day of August, in the year of our Lord one thousand eight hundred and ninety-four.

JNO. M. ROBINSON,
Chief Judge Court of Appeals of Maryland.

(Filed Aug. 28, 1894, endorsed as follows:)

"Service of copy of the within citation admitted this 27th day of August, 1894. Thomas G. Hayes, att'y for Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector, defendants in error.

9 April Term, 1894.

STATE OF MARYLAND, *sct:*

At a court of appeals for the State of Maryland begun and held, for the said State, at the city of Annapolis, on the first Monday in April, being the second day of said month, in the year of our Lord eighteen hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

Hon. John M. Robinson, chief judge.
" Henry Page.
" David Fowler.
" A. Hunter Boyd.
" Charles B. Roberts.
" James McSherry.
" John P. Briscoe.
" Wm. Shepard Bryan.
J. Frank Ford, clerk.

10 THE MAYOR AND CITY COUNCIL OF BALTIMORE CITY and LEWIS N. HOPKINS, City Collector,
vs.
CLEMENTINE ULMAN, by Her Husband and Next Friend, ALFRED J. ULMAN.

Be it remembered that now, here, on the second Monday in January, being the eighth day of the said month, in the year of our Lord one thousand eight hundred and ninety-four, the judge of the circuit of Baltimore city, being in the eighth judicial circuit of Maryland, in pursuance of the directions of the act of assembly in such case made and provided, transmit- to the court of appeals here the record of proceedings of a cause which was lately depending before him in the said circuit court of Baltimore city, between Clementine Ulman, by her husband and next friend, Alfred J. Ulman, plaintiff, and The Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector, defendants, and wherein
11 said circuit court of Baltimore city passed a decree in favor of the said Clementine Ulman, by her husband and next friend, Alfred J. Ulman, against the said The Mayor and City Council of Baltimore and L. N. Hopkins, city collector, and from which

said decree the said The Mayor and *and* City Council of Baltimore, &c., appealed to the court of appeals here, the tenor of which said record of proceedings is in form following, to wit:

12 *Bill of Complaint and for Injunction.*

(Filed 10th February, 1894.)

In the Circuit Court of Baltimore City.

CLEMENTINE ULMAN, by Her Husband and Next Friend, ALFRED J. ULMAN, *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE and LEWIS N. HOPKINS, City Collector.	In the Circuit Court of Baltimore City.

To the Honorable J. Upshur Dennis, judge of said court:

The bill of complaint of Clementine Ulman, by her husband and next friend, Alfred J. Ulman, respectfully represents:

1. That she is the owner of property in Baltimore city, abutting on North avenue, between Pennsylvania avenue and the western limits of said city, as the limits existed at the time of the passage of ordinance No. 100, hereinafter mentioned.

2. That by the act of the General Assembly of the State of Maryland, of 1874, chapter 218, section 2 (Code of Public Local Laws, article 4, section 810, p. 545), it was provided that:

"The said mayor and city council shall have, and are hereby vested with full power and authority to provide by ordinance for the grading, shelling, gravelling, paving, and curbing, or for the regrading, reshelling, regravelling, repaving and recurbing of any street, lane or alley in said city, or part thereof, now condemned, ceded, or opened as a public highway, or which may hereafter be condemned, ceded, opened, widened, straightened or altered according to the laws and ordinances regulating the same; and also for assessing the cost of any such work in whole or in part *pro rata* upon the property binding on such street, lane or alley, or part thereof, and for collecting such assessments as other city taxes are collected."

3. In the year 1886, the mayor and city council of Baltimore, by virtue of the aforesaid act of assembly, passed an ordinance known as "No. 100, of the ordinances of 1886," and approved June 24, 1886, which is thus set forth:

"An ordinance to provide for grading, paving and kerbing North avenue, between Pennsylvania avenue and the western city limits."

"SECTION 1. Be it enacted and ordained by the mayor and city council of Baltimore, That the commissioner be, and he is hereby authorized and directed to have all that part of North avenue, between Pennsylvania and the western city limits, graded, paved,

and kerbed in pursuance of the act of assembly, chapter
13 218, of April 2, 1874, and according to the provisions of article 47 of Baltimore City Code, title 'streets and city commissioners,' subtitle, 'grades, grading, paving, &c.,' providing for repaving, &c., of streets, lanes and alleys in the city of Baltimore, so far as the same may be applicable, the expenses thereof to be assessed as provided in said article 47, section 34, in regard to paving and repaving done under the provisions of said article, upon the owners of property binding on said avenue, in proportion to the number of front feet owned by them respectively on the portion of said avenue hereby directed to be paved; provided that the city commissioner shall not proceed to act under the ordinance until the damages awarded for the opening of said part of said avenue shall have been paid, or tendered to the owners of said parts so condemned and opened, or invested for the use of such owners, as now provided by article 47, section 16, of the Baltimore City Code."

4. That the city commissioner for said city, claiming to act in pursuance of said ordinance, caused North avenue, between Pennsylvania avenue and the western city limits aforesaid to be graded, paved and kerbed in 1887, under contract dated October 18, 1886, and afterwards, to wit, on the 22nd day of November, 1888, assessed $4,639.27 of the alleged cost thereof against this complainant, and on the 22d day of November, 1888, issued to the collector of taxes for said city a paper purporting to be a warrant, directing him to proceed to the collection thereof. That the collector, after the receipt of the warrant, demanded payment of the amount aforesaid, which your orator refused, and the said collector having subsequently threatened to distrain upon, execute and sell the said property of your oratrix for its payment, she, on December 19, 1889, filed in this honorable court her bill of complaint, setting forth the above facts, and claiming that the said act of assembly of Maryland, of 1874, and the said ordinance No. 100, did not provide for notice nor for any mode of confirming or contesting the said charge or assessment, nor for an appeal; and that they were therefore unconstitutional and void, and praying that the court would declare them unconstitutional and void; and that the defendants and each of them should be perpetually enjoined from distraining upon, executing and selling the property of your oratrix, and from enforcing said illegal assessment in anywise or manner. That the defendants appeared and answered, and testimony having been taken, the case was submitted, and the court, on the 27th day of March, 1890, passed a decree refusing the relief prayed and dismissing the bill of complaint; from which decree an appeal was taken to the court of appeals, which, on the 1st day of July, 1890, reversed the said decree and remanded the cause to this court; and this court, on the 13th day of March, 1893, passed a final decree whereby the said ordinance No. 100 and the said assessment thereunder were declared to be unconstitutional, null and void; all of which will appear by the record in said cause in this honorable court, to which reference is here made, and which it is prayed may be taken as part of this bill of complaint.

5. That the General Assembly of Maryland, by chapter 219 of the Acts of 1892, approved March 28, 1892, repealed and re-enacted said section 810, of article 4, of the Public Local Laws of Maryland, so as to read as follows:

14 "SECTION 810. They shall have and are hereby vested with full power and authority to provide by ordinance for the grading, shelling, graveling, paving and kerbing, or for the regrading, reshelling, regraveling, repaving and rekerbing of any street, lane or alley in said city, or part thereof, hereafter to be condemned, ceded, opened, widened, straightened or altered, according to the laws and ordinances regulating the same; and also for assessing the cost of any such work in whole or in part upon the property binding upon such street, lane or alley, or part thereof, according to such rule or basis as the mayor and city council may determine, and for collecting said assessments in such manner as they may prescribe, either before or after the work shall have been done; provided that before the passage by either branch of the council of any ordinance requiring the whole or any portion of the cost to be assessed upon the property, ten days' notice shall be given in at least two of the daily newspapers in said city, and an opportunity shall be afforded to all persons interested therein to appear and be heard before some appropriate committee of the council; and they may also provide for appeals to the Baltimore City court from the decisions of any commissioner or other person or persons appointed to determine the amount of assessment to be made upon any property under such ordinance, and in the trial of such appeal, the practice shall conform as near as may be to the practice in the trials of street appeals, including the right of appeal to the court of appeals."

And by chapter 284 of the Acts of 1892, approved April 1st, 1892, enacted the following:

"Whereas, certain streets, lanes and alleys, or parts thereof, in the city of Baltimore, have been graded, paved or curbed, or regraded, repaved or recurbed under ordinances of the mayor and city council, which provided for the assessment of the whole or certain portions of the cost of such work upon the property binding on such streets, lanes or alleys, or parts thereof so improved, some of which assessments have been paid and other portions thereof remain uncollected, although the mayor and city council have paid the whole cost of such improvements.

"And whereas, it is just and proper that all property, which may have been benefitted by such work, should pay its proper proportion of such cost, to the extent that such property may have been specially benefitted; therefore,

"SECTION 1. Be it enacted by the General Assembly of Maryland, That in any or all cases where any street, lane or alley, or any part thereof in the city of Baltimore has been graded, paved or curbed, or regraded, repaved or recurbed under any ordinance which provided for assessing the whole or any portion of the cost of such improvement upon the property binding upon such street, lane or alley, or part thereof, and such assessments or any part thereof remain unpaid, it shall be lawful for the mayor and city council of Baltimore

to provide by ordinance for the levy and collection in such manner as they may deem proper, of a tax upon all the property binding upon any street, lane or alley, or part thereof, which may have been so improved, to the extent that such property shall have been specially benefitted by such improvement; provided that no property upon which the assessment originally made for its share of the cost of such improvement shall have been paid, shall be again assessed, and that reasonable notice and an opportunity to be heard shall be given to all persons interested before the final ascertainment of the amount of tax to be paid by any such property; and the said mayor and city council shall provide for appeals to the Baltimore city court by any person or persons interested, including the mayor and city council themselves, from the decision of any commissioner or commissioners, or other persons appointed to determine the amount or amounts of such special taxes or assessments; and in the trial of such appeals the practice shall conform as near as may be to the practice in the trial of street appeals, including the right of appeal to the court of appeals."

6. That subsequently the mayor and city council passed ordinance known as No. 84, approved April 20, 1893, which is as follows:

"Whereas, by an ordinance No. 100, approved June 24, 1886, entitled 'An ordinance to provide for grading, paving and kerbing North avenue, between Pennsylvania avenue and the western city limits,' provision was made that all that part of North avenue between Pennsylvania avenue and the western city limits should be graded, paved and kerbed, and that the expense thereof should be assessed upon the owners of property binding on said avenue, in proportion to the number of feet owned by them, respectively, of the said portion of the said avenue hereby directed to be paved, in accordance with section 34 of article 47 of the Baltimore City Code of 1879; and after the work had been done by the city commissioners, and some of the property-holders had paid the amount assessed against them, the court of appeals of Maryland, in a suit instituted to resist the collection of the said assessment, declared the said assessment to be null and void, and therefore a large portion of the cost of such grading, paving and kerbing of North avenue and the western city limits has never been paid to the mayor and city council of Baltimore; and

"Whereas, by chapter 219 of the Acts of 1892, full power and authority is given to the mayor and city council of Baltimore to provide by ordinance for the levy and collection, in such manner as they may deem proper, or a tax upon all property binding upon any street, lane or alley, or part thereof, which may have been so improved, to the extent that such property shall have been specially benefitted by such improvement; provided that no property upon which the assessment originally made for its share of the cost of such improvement shall have been paid, shall be again assessed, and that a reasonable notice and an opportunity to be heard shall be given to all persons interested, before the final ascertainment

of the amount of tax to be paid by any such property; now, therefore,

"SECTION 1. Be it enacted and ordained by the mayor and city council of Baltimore, That the city commissioners be authorized and directed to give ten days' notice, in two of the daily newspapers published in the city of Baltimore, that on the day and at the time and place mentioned he will ascertain and determine the amount of tax to be assessed upon all property binding on North avenue, between Pennsylvania avenue and the western city limits, and which did not pay the assessment levied upon it under ordinance No. 100, approved June 24th, 1886, for the special benefits which have been derived by said property from the grading, paving and kerbing of said portion of North avenue, on the day and at the place named; after hearing all persons interested, who may desire to be heard, he shall proceed to apportion among the different pieces of property binding on said portion of North avenue, and upon which there has not been paid the assessment levied under ordinance No. 100, approved June 24th, 1886, the total cost of the grading, paving and kerbing of the said portion of North avenue, with interest thereon from the time the same was paid for by the mayor and city council of Baltimore to the day the city commissioner makes such apportionment, less the amount which has been paid by the holders of the pieces of property binding on the said portion of North avenue who paid the assessments levied under the said ordinance No. 100, approved June 24th, 1886; provided, however, the tax assessed against any piece of property shall not be more than the amount which said property has been specially benefitted by the grading, paving and kerbing of said portion of North avenue; and the city commissioner may adjourn from time to time, if necessary, to give all parties an opportunity to be heard, and after hearing the different parties interested he shall make out a list of the property and of the owners thereof liable to pay the tax and the amount to be paid by each piece of property, and shall deliver to the city register a duplicate list thereof, under his hand, together with such explanatory plat or plats, if any, as may be necessary to designate the property upon which said tax or assessment is levied, which taxes shall be liens upon the several pieces of property upon which the same shall respectively be assessed.

16

SEC. 2. And be it further enacted and ordained, That it shall be the duty of the city register, within five days after the said proceedings shall have been deposited in his office, to notify all persons interested, by an advertisement to be inserted once a week for two successive weeks in two of the daily newspapers of the city, that the said assessment or explanatory plat or plats have been so placed in his office, and that the parties affected thereby are entitled to appeal therefrom by petition in writing to the Baltimore city court.

SEC. 3. And be it further enacted and ordained, That it shall be the duty of the city commissioner to serve written or printed notices on each and every party or parties assessed or taxed under

this ordinance; provided, however, that the service of such notice shall not be so construed as to be one of the prerequisites to the collection of the said assessment or tax.

SEC. 4. And be it further enacted and ordained, That any person or persons, including the mayor and city council of Baltimore, who may be dissatisfied with any assessment in which he or they are in any manner interested, may, within thirty days after the return of the above-mentioned list of the property and owners or reputed owners thereof liable to said tax or assessment by the city
17 commissioner to the city register, appeal therefrom by petition to the Baltimore city court, praying said court to renew the same; and thereupon the proceedings shall be similar to those in the case of the trial of street appeals. And the same right shall be had to appeal to the court of appeals.

SEC. 5. And be it further enacted and ordained, That if no appeal shall have been prayed, then, within ten days after the time hereinbefore limited therefor, or after the return of the final decision upon any such appeal or appeals shall have been made to the register, the said register shall transfer the said list received from the city commissioner to the city collector, who shall thereupon proceed in all respects as he does in cases where persons or property are assessed for benefits for opening, closing, widening and straightening any street, lane or alley.

SEC. 6. And be it further enacted and ordained, That this ordinance shall take effect from the date of its passage."

7. That the city commissioner for said city of Baltimore, claiming to act in pursuance of said ordinance No. 84, made the following assessments against the following parties, on account of the alleged costs of grading, paving and kerbing North avenue between Pennsylvania avenue and the western limits aforesaid, to wit:

Lot A. Sarah A. Schmenner, 60.3 feet at $3.19—89,466		$192 73
Interest from 22 Jan., 1889, to 1st July, 1893		51 27
		244 00
Lot B. Clementine Ulman, 1,465.1½ feet at ditto		4,686 86
Less 102.8 feet kerb @ 45c	46 20	
" commissions	1 39	
		47 59
		4,634 27
Interest from 22 Jan., '89, to 1st July, '93		1,234 68
		5,873 95

Lot C. Lewis N. Wise, 80.9 ft. at ditto.....		258 31
Interest from 22 Jan., '89, to 1st July, '93.....		68 75
		327 06
Lot D. Sarah A. Schmenner, 42.4 feet at ditto.		135 42
Interest from 22 Jan., '89, to 1st July, '93.....		36 04
		171 46
Lot E. Nicholson, 70 feet at ditto.....		223 93
18 Interest from 22 Jan., '89, to 1st July, '93...		59 60
		283 53
Total		6,900 00
Amount of assessments...	5,497 29	
Less kerbing.....	47 59	
	5,449 66	
With interest from 22 Jan., '89, to 1st July, '93.	1,450 34	
	$6,900 00	6,900 00

The aforegoing being an exact duplicate of the original list of the property and of the owners, or reputed owners thereof, claimed to be liable to pay the assessment under ordinance No. 84, and the amount paid by each piece of property, on file in the office of said city commissioner—the said parties being the owners of only a portion of the property binding on said North avenue between Pennsylvania avenue and the said western limits, graded, paved and kerbed and benefitted thereby, and the land so assessed being only a portion of said property.

8. That the said commissioner, on the 7th day of October, 1893, delivered a duplicate of the said list to the city register, who subsequently, to wit, on the 14th day of December, 1893, transferred it to the city collector. That the said city collector demanded payment of your oratrix of the amount assessed against her, as aforesaid, under said ordinance No. 84, with interest from January 22, 1889, which she, denying any liability therefor, refused, and he threatened to distrain upon, execute and sell the said property of your oratrix to satisfy the said sum of $4,637.27, with interest from January 22, 1889, making a total of $6,050, if the same be not paid by your oratrix at once.

9. Your oratrix avers, that if the said mayor and city council and said city collector, or either of them, had any claim against your oratrix or against her said property, or any portion thereof, for or on account of the said grading, paving and kerbing, or of the costs and expenses thereof, or for or on account of any portion thereof,

which she denies, the said alleged claim and the cause of action or suit therefor did not accrue or arise within four years prior to the filing of the bill of complaint, and any and all claim and any — all suits or actions or proceedings therefor are forever barred, and she claims the benefit of all and every statute of limitations applicable thereto.

10. Your oratrix avers, that if the said mayor and city council and the said city collector, or either of them, had any claim against your oratrix or against her said property, or any portion thereof, for or on account of the said grading, paving and kerbing, or of the costs and expenses thereof, or for or on account of any portion thereof, which she denies, the said alleged claim and the cause of action, or suit therefor, did not accrue or arise within three years prior to the filing of the bill of complaint, and any and all claim, and any and all suits or actions or proceedings therefor are
19 forever barred, and she claims the benefit of all and every statute of limitations applicable thereto.

11. That North avenue, between Pennsylvania avenue and the western city limits, although it appears on Poppleton's plat, was not opened or condemned, nor any act or ordinance passed therefor, nor any steps taken towards the opening or condemnation, nor had the same been in anywise dedicated, nor had the city any interest whatsoever therein until the year 1884. That the north side of North avenue, when the said grading, paving and kerbing was done, to wit, in 1887, was wholly in Baltimore county and not within the jurisdiction of the mayor and city council of Baltimore. The said grading, paving and kerbing were therefore wholly unauthorized, and all assessments therefor are null and void.

12. That North avenue, between Pennsylvania avenue and the western city limits, although it appears on Poppleton's plat, was not opened or condemned, nor any act or ordinance passed therefor, nor any steps taken towards its opening or condemnation, nor had the same been in anywise dedicated, nor had the city any interest whatever therein until the year 1884. That one-half of the said property of your oratrix, assessed as aforesaid for said grading, paving and kerbing of North avenue, was, when the said work was done, to wit, in 1887, on the north side of said avenue, wholly within the limits of Baltimore county and beyond the jurisdiction of the mayor and city council of Baltimore. The said assessment against the said property of your oratrix in Baltimore county (being one-half of the whole said assessment against her), was therefore unauthorized and void.

13. That by the aforesaid decree of this honorable court, passed on the 13th day of March, 1893, said ordinance No. 100, of 1886, was decreed to be unconstitutional, null and void. The grading, paving and kerbing of North avenue between Pennsylvania avenue and the western city limits was therefore without legal sanction, and no assessment for the costs thereof against your oratrix or against her said property can be lawfully made, and the said assessment under ordinance No. 84 is null and void.

14. That by the aforesaid decree of this honorable court, passed

on the 13th day of March, 1893, the assessment under said ordinance No. 100, of 1886, was decreed to be null and void, and the defendants were perpetually enjoined and restrained from collecting the same and from enforcing it in anywise whatsoever. The act of 1892, chapter 284, was therefore an exercise by the legislature of judicial powers in violation of the 8th and 23rd articles of the declaration of rights, and is unconstitutional, null and void.

15. That the act of 1892, ch. 284, and the act of 1892, ch. 219, so far as the latter may be claimed to apply to the said assessments, are unconstitutional, null and void.

16. That ordinance No. 100, of 1886, did not require any notice to be given to the property-holders abutting upon North avenue between Pennsylvania avenue and the western limits of said city, and the same was therefore in contravention of the fifth amendment and first section of the fourteenth amendment of the Constitution of the United States, and the said ordinance and the assessment thereunder were therefore null and void and no assessment for or on account of any part of the cost of the grading, paving and kerbing done thereunder can be assessed against or collected from your oratrix or her said property.

17. That chapter 219 of the act of 1892, above set out, contains a provision, "that before the passage by either branch of the council of any ordinance requiring the whole or any portion of the cost to be assessed upon the property, ten days' notice shall be given in at least two of the daily newspapers in said city and an opportunity shall be afforded to all persons interested therein to appear and be heard before some appropriate committee of the council." That said notice was not given prior to the passage of said ordinance No. 84, and the said order was therefore passed in violation of the express conditions of said act of assembly, and the said ordinance and the assessment levied thereunder are without legal sanction and void.

18. That by the act of 1874, ch. 218, under which the said grading, paving and kerbing of North avenue was done, provided for "assessing the cost of any such work in whole or in part *pro rata* upon the property binding on such street, lane or alley," &c. That by the act of 1892, ch. 219, that provision was repealed and the mayor and city council was authorized to assess "the cost of any such work, in whole or in part, upon the property binding upon such street, lane or alley, or part thereof, according to such rule or basis as the mayor and city council may determine," &c. No assessment for said grading, paving and kerbing could be lawfully made under the said provisions of the act of 1892, ch. 284, and the said assessments are therefore null and void.

19. That ordinance No. 84, of 1893, was passed without any legislative or other sanction, and it and the alleged assessments made thereunder are and each of them is null and void.

20. That ordinance No. 84 provides that the city council shall apportion among the different pieces of property binding on said portion of North avenue, and upon which there has not been paid the assessment levied under ordinance No. 100, approved June 24,

1886, the total cost of grading, paving and kerbing the said portion of North avenue, "less the amount which has been paid by the holders of the pieces of property binding on the said portion of North avenue who paid the amount levied under the said ordinance No. 100, approved June 24, 1886." This provision is in violation of the fundamental law of equality. It limits the assessment to the property upon which no payments under ordinance No. 100 has been made, and the other property binding on said North avenue between Pennsylvania avenue and the western city limits, graded, paved and kerbed and benefitted thereby, is entirely excluded from further contribution to the cost of the work, irrespective of whether the amount heretofore paid is their full share of said costs or not, and the ordinance and the assessment thereunder are therefore null and void.

21. That the attempted assessment under ordinance No. 100 having, as before stated, been by the court of appeals held to be null and void, it must be treated in every respect as if it had never been made, and as no other ordinance has been passed, ordinance No. 84 is null and void, as it provides for and directs the city commissioner to make assessments on only a portion of the property on North avenue, between Pennsylvania avenue and the western city limits—expressly excluding other portions graded, paved and kerbed under said ordinance No. 100 and benefitted thereby.

22. That by section 2 of said ordinance No. 84, it is provided that it shall be the duty of the city register, within five days after the said proceedings by the city commissioner shall have been deposited in his office, to notify all persons interested by an advertisement to be inserted once a week for two successive weeks in two of the daily newspapers of the city. That said notice was not given as required by said ordinance, and the said assessment is therefore null and void.

23. That the said assessment against your oratrix, under said ordinance No. 84, is for the sum of $4,639.27, and for interest thereon, at the rate of six per centum per annum, from January 22, 1889, amounting now, as above stated, to upwards of $6,050. That the said sum of $4,639.27 is, according to the commissioner's estimate, the full proportion of the entire costs of the grading, paving and kerbing on North avenue, aforesaid, and the said claim for interest thereon is without any legal sanction, there being nothing in the acts of assembly, under which the said mayor and city council claim to act, authorizing it. That even if the said assessment for the said sum of $4,639.27 be held to be valid, there is no authority for the charge of interest thereon, except from the time the payment of said sum of $4,639.27 was demanded by the city collector of your oratrix under said ordinance No. 84.

24. That for the reasons heretofore assigned, the said Lewis N. Hopkins, city collector as aforesaid, is not authorized to enforce the said alleged assessment under ordinance No. 84 against the said property of your oratrix or against her personally, and the attempt

to sell her property for the non-payment of said alleged assessment will cast a cloud upon the title thereof.

Your oratrix therefore prays:

First. That the said act of 1892, ch. 284, and ordinance No. 84, and each of them, be declared null and void.

Second. That the said assessment against your oratrix under said ordinance No. 84, be declared null and void.

Third. That all the proceedings in making said assessment under ordinance No. 84, may be vacated and set aside.

Fourth. That the mayor and city council of Baltimore, and Lewis N. Hopkins, collector as aforesaid, may be enjoined and restrained from distraining upon, executing and selling the property of your oratrix, and from enforcing said illegal assessment in anywise or manner, either by action or suit at law or in equity.

Fifth. That your oratrix may have such other and further relief as her case may require.

22 Sixth. That your honor will grant unto your oratrix the writ of subpœna, directed to the said mayor and city council of Baltimore, and the said Lewis N. Hopkins, city collector, as aforesaid, commanding them to be and appear in this honorable court at some day to be therein named, to answer the premises and abide by and perform any decreee or order that may be passed therein.

And as in duty, &c.

M. R. WALTER,
For Plaintiff.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

On this 10th day of February, 1894, before me, a justice of the peace of the State of Maryland, in and for said city of Baltimore, personally appeared Alfred J. Ulman, and made oath in due form of law, that the matters and things contained in the foregoing bill of complaint are true as therein set forth, to the best of his knowledge and belief.

JOHN L. HEBB, *J. P.*

I hereby authorize Moses R. Walter, Esq., to use my name as the next friend of my wife, Clementine Ulman, in the above-entitled cause.

ALFRED J. ULMAN.

MEM.—The decree of the 13th March, 1893, passed in a cause in this court, between the same parties, instituted on the 19th of December, 1889, as particularly set out in the fourth paragraph of the above bill of complaint and invoked in these proceedings, is inserted in this transcript by agreement of counsel, and is as follows, to wit:

"CLEMENTINE ULMAN, by Her Husband and Next Friend, ALFRED J. ULMAN, *vs.* "THE MAYOR AND CITY COUNCIL OF BALTIMORE and Lewis N. Hopkins, City Collector.	In the Circuit Court of Baltimore City. Decree in 1st Case. Docket A, 1889, folio 304.

"This cause standing ready for hearing, and having been submitted by the counsel for the respective parties, and the proceedings having been read and considered, it is thereupon, this 13th day of March, in the year eighteen hundred and ninety-three, by the circuit court of Baltimore city, adjudged, ordered and decreed, in conformity with the opinion of the court of appeals upon the appeal heretofore taken in this cause, and by direction of the said court of appeals, that ordinance No. 100, of 1886, passed by the mayor and city council of Baltimore, is unconstitutional, null and void, and that the assessment of $4,629.32 made thereunder, against the complainant in these proceedings mentioned, is also null and void.

23 "And it is further adjudged, ordered and decreed, in conformity with the said opinion of and by direction of the said court of appeals, that the said mayor and city council of Baltimore and Lewis N. Hopkins be and they are hereby perpetually enjoined and restrained from collecting said assessment and from distraining upon, executing and selling the property of the said complainant, for the purpose of collecting said assessment, or from enforcing said assessment in anywise or manner whatsoever.

"And it is further ordered, that the defendants pay the costs of these proceedings, to be taxed by the clerk of this court.

"J. UPSHUR DENNIS.

"(Endorsed:) This decree seems in proper form. W. S. Bryan, Jr., city solicitor."

Answer of Defendants to the Bill.

(Filed 13th February, 1894.)

CLEMENTINE ULMAN, &c., *vs.* MAYOR AND CITY COUNCIL, &c., *et al.*	In the Circuit Court of Baltimore City.

The answer of The Mayor and City Council of Baltimore and of Lewis N. Hopkins, city collector, to the bill against them in this court exhibited.

To the Honorable J. Upshur Dennis, judge, &c.:

These defendants, answering, say:

I. That they admit the matters and things in the first, second, third, fourth, fifth and sixth paragraphs of said bill.

II. That after duly giving the notices prescribed by ordinance No. 84, approved April 20th, 1893, and after following all the other

requirements of said ordinance, the city commissioner did assess all the property binding on North avenue between Pennsylvania avenue and the western city limits, which did not pay the assessment levied upon it under the ordinance 100, approved June 24th, 1886, for the special benefits derived by said property from the grading, paving and kerbing of said portion of North avenue; and did, after affording an opportunity to be heard to all persons interested who might desire to be heard, apportion among the several pieces of property binding on said portion of North avenue, on which had not been paid the assessment levied under ordinance No. 100, approved June 24th, 1886, the total cost of the grading, paving and kerbing of said portion of North avenue, less the amount which had been paid by the owners of pieces of property binding on said portion of North avenue who paid the assessments levied under said ordinance, with interest thereon from the time the same was paid for by the mayor and city council of Baltimore to the day the city
24 commissioner did make such assessment; that after in all respects following the ordinance, the city commissioner did make out a list of the properties and of the owners thereof liable to pay this tax, and the amount to be paid on ea[illegible]iece of property, and did deliver such list in duplicate to the cit[illegible]register, under the hand of the said city commissioner, with an ex[illegible]anatory plat thereof. This was done on the 11th day of Novembe[illegible]893, and the list set forth in paragraph seven of the bill of comp[illegible]aint is a true and correct copy thereof. That this list contained all the property binding on said portion of North avenue which had not paid the tax levied and assessed under ordinance 100, approved June 24th, 1886, and none of the property binding on said portion of North avenue which had paid said tax. It is admitted that the said property so excepted from said assessment and from said list was paved, kerbed and graded under said ordinance 100, and was benefitted thereby.

III. That the duplicate lists above mentioned were delivered to the city register on November 11th, 1893, and not on the 7th day of October, 1893, as erroneously stated in the bill of complaint. That on the 7th day of October, 1893, the city commissioner sent the lists to the register's office, but the same being found to be incomplete in this—that the explanatory plats were not in proper shape, the register did not accept the same, but sent them back, and the explanatory plats were then properly and accurately drawn, and the duplicate lists and plats were sent back to the register in their present form; the same were received on November 11th, 1893, and the proper notices, all in due form, were inserted in both the Herald and the Sun, being two daily newspapers published in Baltimore, once a week for two successive weeks, the first insertion being upon November 13th, 1893; and on the 14th of December, 1893, the said city register did transfer said duplicate lists to the city collector.

IV. And these defendants are advised that the amounts so assessed are valid liens upon the several pieces of property upon which they severally were assessed.

V. That the matters set forth in paragraphs 9, 10, 11, 13, 14, 15, 16, 18, 19, 20, 21, 23 and 24, are in the nature of legal arguments, of the sufficiency of which the court can judge. These defendants are, however, advised that the positions assumed therein are not sound or tenable. These defendants also admit the facts alleged in paragraphs 11 and 12, but deny the legal conclusions sought to be deduced therefrom.

VI. That the statement in paragraph 22 of the bill of complaint, that the city register did not, within five days after receiving the duplicate lists of the property assessed, notify all persons interested by an advertisement inserted once a week for two successive weeks, in two of the daily newspapers of the city, is erroneous, such notice having been duly and regularly given.

VII. These defendants aver and claim that the said ordinance No. 84, of April 20th, 1893, was not passed under any authority given by chapter 219 of the Acts of 1892, but was passed under the authority given in chapter 284 of the Acts of the same year, and the mention of chapter 219, of the Acts of 1892, in the recital
25 of said ordinance, was clearly a clerical error or a misprint, being intended for chapter 284 of the Acts of 1892, and that this clearly appears from the context.

Having answered as fully as they are advised is necessary, these defendants pray to be dismissed with their reasonable costs.

WILLIAM S. BRYAN, JR.,
City Solicitor for Defendants.

Agreement to Amend Pleadings and Order Thereon.

(Filed 30th March, 1894.)

CLEMENTINE ULMAN, &c.,
vs.
MAYOR AND CITY COUNCIL, &c., *et al.* } In the Circuit Court of Baltimore City.

It is hereby agreed that either party may amend the pleadings in this cause as he may be advised.

M. R. WALTER, *For Pl'tff.*
W. S. BRYAN, JR., *For Def'ts.*

Ordered this 30th day of March, 1894, that leave be granted the parties to amend their pleadings as above agreed.

J. UPSHUR DENNIS.

Agreement for Pro Forma Decree and as to Record.

(Filed 30th March, 1894.)

CLEMENTINE ULMAN, &c.,
vs.
MAYOR AND CITY COUNCIL, &c., *et al.* } In the Circuit Court of Baltimore City.

It is agreed in this case that the case shall be heard on bill and answer, and that the accompanying decree shall be signed *pro forma*,

and that the record in the former case, between the same parties, shall be considered as an exhibit filed with the bill, and that in making up the record for the court of appeals the clerk shall insert a copy of the final decree passed after the remanding of the case from the court of appeals to this court, the rest of said record to be read from the printed transcript in the court of appeals.

It is further agreed that all ordinances of the mayor and city council of Baltimore may be read and relied on by either party at the hearing, as if fully set forth in the bill or answer.

M. R. WALTER,
For Plaintiff.
W. S. BRYAN, JR.,
For M. and C. C. of Balto.

26 *Decree Pro Forma.*

(Filed 30th March, 1894.)

CLEMENTINE ULMAN, by Her Husband and Next Friend, ALFRED J. ULMAN,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and Lewis N. Hopkins, City Collector.

In the Circuit Court of Baltimore City, March Term, 1894.

This cause standing ready for hearing, and having been submitted by the solicitors for the respective parties.

It is thereupon, this 30th day of March, 1894, by the circuit court of Baltimore city, adjudged, ordered and decreed *pro forma*, that ordinance No. 84, of 1893, passed by the mayor and city council of Baltimore, and the assessments thereunder, against the said plaintiff and her property mentioned in these proceedings, are null and void.

And it is further adjudged, ordered and decreed *pro forma*, that the said mayor and city council of Baltimore, and the said Lewis N. Hopkins, city collector, be and they are hereby perpetually enjoined and restrained from collecting said assessment, and from distraining upon or selling the property of the complainant or otherwise enforcing the said assessment.

And it is further ordered, that the defendants pay the costs of these proceedings, to be taxed by the clerk of this court.

J. UPSHUR DENNIS.

Defendants' Order for Appeal.

(Filed 30th March, 1894.)

CLEMENTINE ULMAN, &c.,
vs.
MAYOR AND CITY COUNCIL, &c., *et al.* } In the Circuit Court of Baltimore City.

Mr. CLERK: Enter an appeal from the decree *pro forma* of this court to the court of appeals of Maryland.

WILLIAM S. BRYAN, JR.,
Sol. for M. & C. C. of Balto.

Which said appeal being by the court here granted, it is thereupon ordered by our said court, that a transcript of the record and proceedings in the cause aforesaid be transmitted to the court of appeals of Maryland, and the same is transmitted accordingly.

Test: ALVIN ROBERTSON, *Clerk.*

27 In testimony that the aforegoing is truly taken from the records and proceedings of the circuit court of Baltimore city in the cause therein entitled.

I hereunto subscribe my name and affix the seal (Seal's place.) of the circuit court of Baltimore city, aforesaid, this 31st day of March, A. D. 1894.

ALVIN ROBERTSON,
Clerk of the Circuit Court of Baltimore City.

28 And now come into the court of appeals here as well the said The Mayor and City Council of Baltimore, &c., by William S. Bryan, Jr., and Thos. G. Hayes, their attorneys, as the said Clementine Ulman, &c., by M. R. Walter, her attorney; and thereupon, on motion of the said Clementine Ulman, &c., by her attorney aforesaid, it is ruled by the court here that the said The Mayor and City Council of Baltimore, &c., assign the errors in the record of proceedings aforesaid or in the passing of the decree aforesaid, so as aforesaid brought before the court of appeals here for correcting the errors supposed to be therein, or decree by the court of appeals here will be entered against them in default thereof: and the said The Mayor and City Council of Baltimore, &c., by their attorneys aforesaid, say that in the record of proceedings aforesaid, and also in the passing of the decree aforesaid,

29 there is manifest error in this, to wit, that by the record aforesaid it appears that the decree aforesaid, in the plea aforesaid given, was given for the said Clementine Ulman, &c., against the said The Mayor and City Council of Baltimore, &c., when, by the law of the land, that decree ought to have been given for the said The Mayor and City Council of Baltimore, &c., against the said Clementine Ulman, &c.; therefore, in that there is manifest error, *and* they prey that the decree aforesaid, for that errors and

others being in the record of proceedings aforesaid, may be reversed, annulled, and held entirely as void, and that they, the said The Mayor and City Council of Baltimore, &c., may be restored to all things which they have lost by occasion of the said decree, and that the said Clementine Ulman, &c., may rejoin to the errors aforesaid, and so forth; and thereupon it is ruled by the court of appeals here that the said Clementine Ulman, &c., join in the errors by the said The Mayor and City Council of Baltimore, &c., above assigned in the record of proceedings aforesaid, or decree by
30 the court of appeals here will be passed against her in default thereof; and the said Clementine Ulman, &c., by her attorney aforesaid, says there is no error in the record of proceedings aforesaid nor in the passing of the decree aforesaid, and she prays that the court of appeals here will proceed to the examination as well of the record of proceedings aforesaid as of the matters aforesaid by the said The Mayor and City Council of Baltimore, &c., above for error assigned, and that the said decree may be in all things affirmed, and so forth. Thereupon further process of and upon the premises between the parties aforesaid is, by virtue of an act of assembly in such cases made and provided, continued before the court of appeals here until the first Monday in April next. The same day is given to the said parties there then to hear the judgment of the court of appeals here of and upon the said premises, and so forth.

31 And now, at this day, to wit, the said first Monday in April, being the second day of the said month, in the year of our Lord one thousand eight hundred and ninety-four, come again into the court of appeals here the parties aforesaid, by their attorney aforesaid.

Whereupon as well the record and proceedings aforesaid and the decree given in form aforesaid as the matters aforesaid by the said The Mayor and City Council of Baltimore, &c., above for error assigned, being seen and by the court of appeals here fully understood and mature deliberation thereupon had, for that it appears to the court of appeals here that there is error in the record of proceedings aforesaid and also in the passing of the decree aforesaid, therefore it is considered by the court of appeals here that the decree aforesaid, given in form aforesaid, be reversed and the bill dismissed with costs.

32 *Memorandum.*

The decree in this case was reversed and the bill dismissed with costs on the 21st day of June, 1894, and on the same day last aforesaid, to wit, June 21st, 1894, there was filed in the office of the clerk of said court a certain opinion and decree in the words and figures following, to wit:

33 Court of Appeals of Maryland, April Term, 1894.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, &c.,
vs.
CLEMENTINE ULMAN, &c.

Judge BOYD delivered the opinion of the court:

In the year 1887 the authorities of the city of Baltimore graded, paved, and curbed North avenue between Pennsylvania avenue and the western city limits. This was done under what was known as "ordinance No. 100 of 1886," passed under the supposed authority of 1874, ch. 218.

In Ulman *vs.* Mayor, &c., 72 Md., 587, this court decided that the assessment levied on Mrs. Ulman's property under that ordi-
34 nance was null and void, as it "made no provision for notice to and hearing of any proprietor whose land adjoined North avenue upon the question what proportion of the tax should be assessed upon his land," and hence was taking property without due process of law. The majority of the judges who sat were of the opinion that the case of Spencer *vs.* Merchant, 125 U. S., 345, was applicable, and, being a Federal question, this court was bound by it, and hence feet constrained to overrule a number of cases which had been decided by this court.

The legislature, at its first session after the decision of the Ulman case, passed two acts, ch. 219 of the Laws of 1892 being amendatory of sect. 810 of art. 4 of Public Local Laws (which was a codification of act of 1874, ch. 218), and ch. 284 of the Laws of 1892, authorizing the mayor and city council of Baltimore to levy special assessments and to provide for the collection thereof upon
35 property binding on any street, &c., which had been graded, &c., unless any ordinance which provided for assessing the whole or any portion of the costs of such works upon the property binding on such street, &c., and which assessments for any cause had not been fully collected.

The mayor and city council passed an ordinance known as "No. 84 of 1893," which, after referring in the preamble to the passage of ordinance No. 100 of 1886, what was done under it, the decision of this court declaring the assessment null and void and to the passage of ch. 219 (claimed by the appellant to mean ch. 284) of the act of 1892, in substance directed: 1. The city commissioner to give ten days' notice, in two of the daily newspapers published in Baltimore, that at the time and place mentioned he would ascertain and determine the amount of tax to be assessed upon all the property binding on North avenue between Pennsylvania
36 avenue and the western city limits upon which the assessment levied under ordinance No. 100 had not been paid for the special benefits which had been derived by said property for the grading, &c., of said portion of North avenue; that after hearing all persons interested who desired to be heard he shall proceed to apportion among the different pieces of property binding on said portion of North avenue upon which the assessment levied under

No. 100 was not paid the total cost of the grading, &c., of said portion of North avenue, with interest thereon from the time the claim was paid by the city to the day he made such apportionment, less the amount paid by those who had been paid under ordinance No. 100, provided the tax assessed against any piece of property should not be more than the amount which the said property had been specially benefitted by the grading, &c., of said portion of North avenue; that he might adjourn from time to time to give all
37 parties an opportunity to be heard, and after the hearing he was required to make out a list of the property and the owners, together with the amount to be paid by each piece of property, and deliver a copy, with an explanatory plat, to the city register, and then provided that such taxes should be liens.

2. That the city register within five days after the proceedings were left in his office should notify all persons interested by advertising once a week for two successive weeks in two of the daily newspapers in the city that the said assessments and explanatory plats had been so placed in his office and that the parties affected thereby were entitled to appeal to the Baltimore city court.

3. That the city commissioner should serve written or printed notices on each party so assessed or taxed, but that service of such notice should not be construed a prerequisite to the collection of the tax.

38 4. That any person dissatisfied with any assessment in which he was in any manner interested could appeal to the Baltimore city court, where the proceedings should be similar to those in the case of trials of street appeals, and the same right should be had to appeal to the court of appeals.

5. That within ten days after the time limited for appeals or after the decisions in case of appeal the city register should turn over the lists to the city collector, who should proceed in all respects as he does in cases where persons or property are assessed for benefits for opening, closing, &c., any street, lane, or alley.

The appellee filed a bill, giving a history of the several acts of assembly and ordinances, alleging that the city collector was about to sell her property for the want of payment of the assessment alleged to have been made under ordinance No. 84, and claiming that the act of 1892, ch. 284, and ordinance No. 84 were null and void.

39 The bill prays that said act, ordinance No. 84, and assessment under it be declared null and void; that all the proceedings in making said assessment be vacated and set aside; that the appellant and city collector be enjoined.

A number of objections to the act of assembly, ordinance, and proceedings thereunder are stated in the bill, which will be hereinafter passed upon.

The appellant filed his answer, admitting for the most part the history of the proceedings as stated in the bill, but alleging that the act of assembly, ordinance, and all proceedings under them were valid.

The case was submitted to the court below on the bill and answer,

and a decree *pro forma* was passed declaring ordinance No. 84 and the assessment thereunder null and void and perpetually enjoined the collection of the assessment.

40 From the *pro forma* decree an appeal was taken by the city. Some of the objections urged by the appellee questioned the validity of ch. 284 of the act of 1892 and ordinance No. 84, whilst others only apply to the method of proceeding or the right to recover if the statute and ordinance be valid.

As the former class of objections attack the very foundation of the assessment, we will consider them first without attempting, however, to wholly distinguish the two classes on some points raised.

The first question that naturally suggests itself is, Had the legislature power to pass any statute to accomplish the purposes indicated in the preamble of this act? The case of Spencer *vs.* Merchant, *supra*, clearly establishes that it had. It is not necessary to discuss how far such a law could affect property that had been *bona fide* transferred from the owner of the property at the time the

41 work was done to some one who had no notice that the property was liable to such a claim, as in this case the title remained in the person whose property is alleged to have been specially benefitted.

We must therefore go a step further and inquire into the validity of this particular statute. In the opinion delivered on the motion for a rehearing in Ulman's case we expressly stated on pages 610 and 611 that there was ample power in the original act of 1874, ch. 218, to enable the city to pass ordinances that would not be subject to the constitutional objection passed on in that case. On page 593 it quoted from Spencer *vs.* Merchant, where it was said that "if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed on his land, there is no taking of this property without due process of law;" and on page 594, in further quoting from that case, it was said: "The statute

42 of 1881 (being the one in controversy) afforded the owners notice and hearing of the question of the equitable apportionment among them and thus enabled them to contest the constitutionality of the statute, and that was all the notice and hearing to which they were entitled."

The act of 1892 authorized the appellant "to provide by ordinance for the levy and collection, in such manner as they may deem proper, of a tax upon all the property binding upon any street, lane, or alley, or part thereof, which may have been so improved to the extent that such property shall have been specially benefitted by such improvement, provided that no property upon which the assessment originally made for its share of the cost of such improvement shall have been paid shall be again assessed." The requirements of the act are to take the total assessment formerly made for improvements, then deduct the amount paid and assess the balance on the properties within the defined limits, to the extent

43 that they have been respectively specially benefitted by the improvement.

That was as certain as if the legislature had named a definite sum to be assessed on those who had not paid on North avenue or any other street where a similar condition of things existed. The objection of appellee that no hearing is given by the statute as to the aggregate sum to be collected was raised and distinctly answered in Spencer's case on page 558. The act of 1892 further provides "that reasonable notice and an opportunity to be heard shall be given to all persons interested before the final ascertainment of the amount of tax to be paid by any such property." It required appellant to provide for appeals to the Baltimore city court from the decision of any commissioner or other person appointed to determine the amount or amounts of such special taxes or assessments, and also for the right of appeal to this court.

44 The ordinance, as shown above, provided for ample notice. Ulman's case, on page 611, authorizes notice by summons or through the newspapers.

Thus we see that appellee had ample opportunity to have a jury pass upon the assessment against her property as well as to have the court below and this court on appeal determine the legality of the proceedings, including the validity of the statute and ordinance. We are of the opinion that Spencer *vs.* Merchant and the former case between these parties fully sustain the validity of the statute and also of the ordinance, unless there be some technical objection to the latter.

We will now pass upon the other class of objections urged by the appellee.

Without meaning to decide that the appellee could in a bill for an injunction properly ask the benefit of the statute of limitation, we have no doubt that it is not a bar to the assessment.

45 It was only made a few months before the bill was filed, and no action occurred until the right to sue on it had matured.

It is contended by appellee that, inasmuch as ordinance No. 100 was declared to be null and void, the grading, paving, and curbing of North avenue were without any legal sanction and void, and that no valid assessment for the cost thereof could consequently be made. The case of Spencer *vs.* Merchant, so frequently cited by us, because we deem it conclusive on many of the points raised in this case, would seem to dispose of that objection. Porter's case, in 18 Md., 301, cited by appellee's counsel, certainly does not sustain his contention. There the city authorities undertook to correct the errors which the court had determined had made the proceedings void by passing an ordinance to confirm the grading and to ratify the acts of the city commissioner. This court on the page cited shows very clearly why that ordinance was not of binding

46 force, because of its "not being authorized by any law;" and in Horn's case, 30 Md., 222, which was a suit against the city for injuries done to his property in grading that avenue, the court decided that the city was not liable, as the acts done were *ultra vires*.

In referring to the ordinance above mentioned it said: "If the

act was void because *ultra vires* and they had no power to authorize it before it was undertaken and commenced, they certainly had no power to adopt it after it was done."

Nor can we agree with the appellee's counsel that because ordinance No. 100 was determined to be void the act of 1892, so far as applicable to the assessment, was unconstitutional, null, and void, being an exercise of judicial powers in violation of the 8th and 23d articles of the declaration of rights. To sustain this he cites Horn's case, in 26 Md., 206. After the decision in Porter's case, which also disposed of a similar case of Horn *et al.*, the legislature under-
47 took to authorize the city to collect the same assessments that this court had determined could not be collected. As was said in Horn's case, in referring to that act of the legislature, "It, in effect, and that most plainly, reversed the judgment of this court." Of course that could not be permitted. But that was not what was done in this case. This court simply determined that the ordinance and assessment then in controversy were null and void, and in pursuance of the decision the court below so decreed and enjoined the appellant and its collector from collecting or in any way enforcing said assessment. The act of 1892 provides for the collection of an assessment to be made to the extent that the property was specially benefitted—not the original assessment, but a new one, and not necessarily the same amount, for it might have been very different if appellee had seen fit to appear before the commissioner or submit her case to a jury.

48 As is said in Mills *vs.* Charlton, 29 Wis., 400, "The original proceedings having failed for reasons which the legislature may lawfully obviate, and the basis for taxation still remaining, the public benefit for improvement received for which the legislature says the property of the citizens shall pay, a reassessment may be authorized." But on this point we might also have contented ourselves by referring to Spencer *vs.* Merchant.

Considerable stress has been laid on the point made by the learned counsel for the appellee that the ordinance is void by reason of the failure to give the ten days' notice required by the act of 1892, ch. 219, to be given before the passage of an ordinance requiring the cost of grading, &c., streets to be assessed upon the property. He first notes the fact that the ordinance itself refers to that chapter. It is true that in the preamble reciting the source of the authority of the city to pass the ordinance it is stated, "Whereas, by
49 chapter 219 of the Acts of 1892, full power and authority is given," &c., but the rest of the preamble itself shows conclusively that it was a mere clerical error and that ch. 284, was intended. But if this were not so a misrecital in an ordinance of the source of the power of the municipality could not affect its validity if, in point of fact, the power to enact it existed. The real question raised by this point is whether or not chap. 219 is applicable to ordinance No. 84 so as to require the notice therein provided for.

Chapter 284 of Laws of 1892 was passed four days after chapter 219. It did not pretend and was evidently not intended to repeal chapter 219, which simply amended the local law of the city pro-

viding for the grading and improving of any street, alley, or lane after it was opened. A careful examination of the two chapters convince- us that the notice required in chap. 219 is not and was not intended to be applicable to ordinances passed in pur-
50 suance of chapter 284. Chapter 219 gives the appellant power to provide by ordinance for improving streets as therein stated and for assessing the costs of any such work, in whole or in part, upon the property binding upon such streets and for collecting the assessment, "provided that before the passage by either branch of the council of any ordinance requiring the whole or any portion of the costs to be assessed upon the property ten days' notice shall be given," &c.

It is perfectly apparent that this legislation only applied to ordinances for such grading or other authorized work as was to be done after the passage of the act. The object of the notice was to give an opportunity "to all persons interested therein to appear and be heard before some appropriate committee of the council" as to the grade character of work, whether the cost should be wholly or in part only borne by the property binding upon the street,
51 whether the work should be done at all, etc. That act provided for ordinances for the work, as well as for the assessment and collection of the costs thereof, whilst chap. 284 provides for the assessment and collection of the costs for work already done by the city. Hence the latter act only required a notice before the final ascertainment of the amount of tax to be paid by any such property.

The position that the act of 1892, chap. 284, and ordinance No. 84 only applied to cases where valid assessments had been made is not supported by a reasonable construction of the act. It does not use the term "valid assessments;" and if it was intended to apply only to assessments that were valid, it would have been of but little, if any, use, as the act would not be necessary to enforce valid assessments.

The question raised as to the interest charged need not be passed upon by us further than to say that, as we have held the
52 statute and ordinance valid, a court of equity could not give the complainant relief for any such alleged irregularities. She had the right to make such objections before the tribunal provided for under the ordinance, but not collaterally or by such a proceeding as this. The cases to that effect are very numerous in this State. We will only refer to O'Neill *vs.* Bridge Company, 18 Md., 1; County Commissioners *vs.* Union Mining Company, 61 Md., 548, and Greenland *vs.* County Commissioners, 68 Md., 59.

We have considered at some length the points raised by the bill that have been pressed by counsel, with the exception possibly of one or two which are disposed of by what we have said above, or at least are met by the case of Spencer *vs.* Merchant.

There is still another question which was presented in argument, although not given in the bill as a reason for the interposi-
53 tion of a court of equity. That is the right of a city collector to sell the property of the appellee.

The act of 1892 authorizes the city "to provide by ordinance for the levy and collection in such manner as they may deem proper of a tax upon all the property binding," etc.

The ordinance, after requiring the list to be placed in the hands of the city collector, directs him to "thereupon proceed in all respects as he does in cases where persons or property are assessed for benefits for opening, closing, widening, and straightening any street, lane, or alley."

Section 806 of article 4 of Public Local Laws is the statute law on the latter subject. It does not prescribe the mode of procedure for the collection of such benefits, but authorizes the appellant "to enact and pass all ordinances from time to time which shall be deemed necessary and proper to exercise the powers and affect the objects above specified."

54 From an examination of the ordinances of the city of Baltimore we find that the appellant has full power to sell for benefits for opening, closing, widening, and straightening any street, lane, or alley; hence the appellant has full and ample power to sell the property of the appellee for the assessment made under ordinance No. 84.

It follows from what we have said we must reverse the *pro forma* decree, the injunction must be dissolved, and the bill dismissed.

Decree reversed and the bill dismissed with costs to the appellant.

Decree.

THE MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*
vs.
CLEMENTINE ULMAN, by Her Husband and Next Friend, ALFRED J. ULMAN.

Court of Appeals of Maryland, April Term, 1894.

55 The appeal in this case standing ready for hearing was argued by counsel for the respective parties, and the proceedings have since been considered by the court.

It is thereupon, this twenty-first day of June, 1894, by the court of appeals of Maryland, and by the authority thereof, adjudged, ordered, and decreed that the *pro forma* decree of the circuit court of Baltimore city dated the 30th day of March, 1894, from which this appeal was taken, be, and the same is hereby, reversed, and the bill dismissed with costs to the appellant.

JNO. M. ROBINSON.
WM. SHEPARD BRYAN.
DAVID FOWLER.
HENRY PAGE.
A. HUNTER BOYD.

56 In the Supreme Court of the United States.

(Filed September 19th, 1894.)

CLEMENTINE ULMAN, by Her Husband and Next Friend, ALFRED J. ULMAN, Plaintiff in Error,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and LEWIS N. HOPKINS, City Collector, Defendants in Error.

Assignment of Errors.

Clementine Ulman, by her husband and next friend, Alfred J. Ulman, says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

1st. That in the hearing and decision of the said cause in
57 the court of appeals of Maryland, at the April term thereof, 1894, there was drawn in question the validity of a statute of the State of Maryland, to wit, a portion of the act of 1892, ch. 284, of the General Assembly of that State, on the ground of its being repugnant to the fourteenth amendment of the Constitution of the United States, and the said court of appeals decided in favor of the validity of said statute, and in so doing erred.

2nd. That in said cause in the court of appeals of Maryland the said plaintiff in error claimed that the said act of 1892, ch. 284, gave no hearing to the parties concerned as to the aggregate sum to be collected thereunder, and that it was therefore in contravention of the fourteenth amendment of the Constitution of the United
58 States, but the said court held the said act to be valid, and in so doing erred.

3rd. That in said cause in the court of appeals in Maryland the said plaintiff in error claimed that the only hearing given by said act of 1892, ch. 284, related to the apportionment of the unpaid balance amongst those who had not paid the original assessment: that the question of the original apportionment between their lands and the lands of those who had not paid was not left open; that that act, therefore, deprived the owners who had not paid the original assessment of the opportunity of being heard upon the question whether the apportionment as between them and the other land-owners binding on North avenue was equitable and fair, and
59 was therefore in violation of the said fourteenth amendment of the Constitution of the United States, but the court of appeals of Maryland held said act to be valid, and in so doing erred.

4th. That the said plaintiff in error claimed in said court of appeals that the assessment against her mentioned in the record *have* been made under said unconstitutional act of 1892, ch. 284, the collection thereof by the defendant in error ought to be restrained, but the court held otherwise and passed a decree dismissing the bill of complaint of the plaintiff in error praying for such restraining order, and in so doing erred.

5th. That there are other errors in said decree of the court of appeals of Maryland to be hereafter assigned in the brief.

Wherefore the said plaintiff in error prays that the said
60 decree of the court of appeals of Maryland, passed in said cause at the April term, 1894, to wit, on the 19th day of June, 1894, may be reversed. M. R. WALTER,

Solicitor for Plaintiff in Error.

61 Know all men by these presents that we, Clementine Ulman and Alfred J. Ulman, her husband, as principals, and Charles Goldsborough and Joseph A. Bokel, as sureties, are held and firmly bound unto The Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector, in the full and just sum of thirteen thousand dollars, to be paid to the said The Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of August, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a session of the court of appeals of
62 Maryland, in a suit depending in said court between the said Clementine Ulman, by Alfred J. Ulman, her husband and next friend, and the said The Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector, a decision and a decree was rendered against the said Clementine Ulman, by her husband and next friend, Alfred J. Ulman, and the said Clementine Ulman, by her husband and next friend, Alfred J. Ulman, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from date thereof:

Now, the conditions of the above obligation is such that if
63 the said Clementine Ulman, by her husband and next friend, Alfred J. Ulman, shall prosecute said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

CLEMENTINE ULMAN. [SEAL.]
ALFRED J. ULMAN. [SEAL.]
CHAS. GOLDSBOROUGH. [SEAL.]
JOS. A. BOKEL. [SEAL.]

Sealed and delivered in presence of—
Witness: ZERLINE E. STAUF,
As to Clementine Ulman.
" ANNE DESMOND,
As to Alfred J. Ulman.
" T. J. SCHAUMLOEFFEL,
As to { Chas. Goldsborough, Jos. A. Bokel.

Approved by—
JNO. M. ROBINSON,
Chief Judge of the Court of Appeals of Maryland.

64 STATE OF MARYLAND, *sct:*

I, J. Frank Ford, clerk of the court of appeals of Maryland, do hereby certify that the foregoing is a true transcript of the record, opinion, decree, and proceedings in the case of The Mayor and City Council of Baltimore *et al. vs.* Clementine Ulman, by her husband and next friend, Alfred J. Ulman, as the same remains on file in the clerk's office of the said court of appeals.

And I do further certify that the foregoing petition, writ of error, citation, assignment of errors, and bond are true copies of the same filed in the office of clerk of the court of appeals aforesaid on the 25th day of August, 1894 (with the exception of the assignment of errors, which was filed on the 19th day of September, 1894, and citation and service of copy endorsed thereon was filed August 28, 1894).

65 And I do further certify that the said court of appeals of Maryland is the highest court of law or equity in said State in which a decision can be had in said case.

In testimony whereof I have hereunto set my hand as clerk and affixed the seal of the said court of appeals this 19th day of September, A. D. 1894.

Seal Court of Appeals, Maryland.

J. FRANK FORD,
Clerk Court of Appeals of Maryland.

Endorsed on cover: Case No. 15,690. Maryland court of appeals. Term No., 174. Clementine Ulman, by her husband and next friend, Alfred J. Ulman, plaintiff in error, *vs.* The Mayor and City Council of Baltimore and Lewis N. Hopkins, city collector. Filed September 25, 1894.

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Office Supreme Court, U. S.
FILED.
NOV 9 1894
JAMES H. McKENNEY,
CLERK.

165-719

IN THE

SUPREME COURT OF THE UNITED STATES.

TERM No. ~~808~~ 174. OCTOBER TERM 1894.

In Error to the Court of Appeals of State of Maryland.

CLEMENTINE ULMAN,

BY HER NEXT FRIEND

ALFRED ULMAN,

Plaintiff in Error.

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendant-in-Error's Brief on Motion to Dismiss and Affirm.

THOMAS G. HAYES,
City Counselor for Baltimore,

WILLIAM S. BRYAN, JR.,
City Solicitor for Baltimore,

Counsel for Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

TERM No. 806. **OCTOBER TERM 1894.**

In Error to the Court of Appeals of State of Maryland.

CLEMENTINE ULMAN,

BY HER NEXT FRIEND

ALFRED ULMAN,

Plaintiff in Error.

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendant in Error.

DEFENDANT-IN-ERROR'S MOTION TO DISMISS AND AFFIRM.

The Defendant in Error moves the Court—

1st. To dismiss the appeal in this cause for want of jurisdiction.

2d. To affirm the decree of the Court of Appeals of Maryland, with ten per cent. damages, because it is manifest that the appeal is frivolous and merely taken for delay.

THOMAS G. HAYES,
City Counselor for Baltimore,

WILLIAM S. BRYAN, JR.,
City Solicitor for Baltimore,

Counsel for Defendant in Error.

Defendant-in-Error's Brief on Motion to Dismiss and Affirm.

STATEMENT.

The Municipal Government of Baltimore, defendant in error, in 1886, determined to pave, grade and kerb North avenue, at that time the northern boundary of the city, from Pennsylvania avenue to the western city limits, and to assess the cost of the improvement upon the abutting property. To carry out this design Ordinance 100 of 1886 (set out verbation in appendix to this brief, marked "Exhibit A,") was passed, which provided that the cost of the improvement should be apportioned among the abutting property-holders, without a hearing, in accordance with what is known as the "front foot rule." This method of apportionment of local assessments had been followed in Baltimore for a great many years, and had the sanction of at least five solemn decisions of the Court of Appeals of Maryland, as follows—

Baltimore vs. Scharf, 56 Md. 50.
Baltimore vs. Johns Hopkins Hospital, 56 Md. 1.
Moale vs. Baltimore, 61 Md. 224.
Alberger vs. Baltimore, 64 Md. 1.
Gould vs. Baltimore, 58 Md. 49.

The municipal authorities did the work, and assessed the cost on the adjacent property; among others, on that of the plaintiff in error. Then, after the work had been done, and after her property had been benefited by having a graded, paved and kerbed public street run through it, and by thus being thrown into the market for building purposes, a bill was filed by her on the ground that under the XIV amendment to the Constitution of the United States, the ordinance was void, because it did not provide for notice, and an opportunity to be heard, before the assessment was apportioned among the different property-holders. This view was accepted as sound by the Court of Appeals of Maryland, all the

previous decisions on the subject were overruled, on the strength of Spencer vs. Merchant, 125 U. S. 345, and the Ordinance No. 100 was declared unconstitutional and void. Ulman vs. M. C. C. Balto., 72 Md. 587 and 609.

While, on principle, it must be conceded the position finally assumed by the Court of Appeals was sounder and more logical than its former position, the effect upon the city of Baltimore was most disastrous. It had, on the faith of the reiterated and oft-repeated decisions to the contrary, expended about eighty thousand dollars in paving and grading different streets under ordinances similar to the one declared void, upon which, at the time of the decision, only some of the property-holders had paid their assessments. While, therefore, the property-holders had secured the benefits of the improvement, some of them had, for the time at least, managed to escape all the burdens thereof, and to cast the same upon their more prompt neighbors, and upon that already overburdened individual, the general taxpayer.

Naturally, those having charge of the public interests were desirous of discovering some method by which the injustice and inequality arising out of the condition of affairs could be remedied. Accordingly, the Legislature of Maryland of 1892 passed an Act, chapter 284 (printed in appendix, and marked "Exhibit B"), which provided that:

"In any and all classes where any street * * or any part thereof in the city had been graded, paved or kerbed, * * under any ordinance which provided for assessing the whole or any portion of the cost of such improvement upon the property binding upon such street, * * or part thereof, and such assessments or any part thereof remain unpaid, it shall be lawful for the Mayor and City Council of Baltimore to provide by ordinance for the levy and collection in such manner as they may deem proper, of a tax upon all the property binding on such street, * * or part thereof, which may have been so improved, to the extent that such property shall have been specially bene-

fited by such improvement; provided, that no property upon which the assessment originally made for its share of the cost of such improvement shall have been paid, shall be again assessed, and that reasonable notice and an opportunity to be heard shall be given to all persons interested, before the final ascertainment of the amount of tax to be paid by any such property."

The statute then provided for appeals from "the commissioner or commissioners or other persons appointed to determine the amount or amounts of such special taxes or assessments," to the Baltimore City Court, and that such appeals, as nearly as practicable, should conform to the trial of street appeals, *i. e.*, appeals to the Baltimore City Court from the Commissioners for Opening Streets—the proceedings by which jury trials are secured under the Local Law of Baltimore City, to the property-holders dissatisfied with the commissioners' award of damages for property taken or the assessment of benefits to adjacent property, when streets are opened or widened. Subsequently, the Mayor and City Council, on April 20, 1893, enacted Ordinance No. 84 of 1893 (printed in appendix, and marked "Exhibit C"), which provided, that after giving ten days' notice in two of the daily newspapers published in Baltimore, of the time and place, the City Commissioner should ascertain and determine the amount of the tax to be assessed upon all property binding on North avenue between Pennsylvania avenue and the Western city limits, which did not pay the assessments levied under Ordinance 100 of 1886, for the special benefits derived from the paving of that portion of North avenue. The ordinance further required the City Commissioner, after hearing all persons interested who may desire to be heard, to apportion among the pieces of property binding on North avenue, whose owners did not pay the amount levied upon them under said Ordinance 100, the total cost of the work done, with interest from the time the same was paid for by the city to the day the City Commissioner should make the apportionment, provided that the amount

of tax assessed against any given piece of property, shall not be more than the amount which said property has been specially benefited by the grading and paving of North avenue.

The ordinance then provided that the City Commissioner should make out a list of property assessed, and of its owners, and deliver the same in duplicate to the City Register, with such explanatory plat or plats as might be necessary to designate the property upon which the tax or assessment is levied, which taxes shall be liens upon the several pieces of property upon which they are assessed. The ordinance then provided that within five days after the proceedings were deposited in his office, the Register should notify all persons interested by an advertisement inserted once a week for two successive weeks in two of the daily papers of the city, that the assessment lists and explanatory plat or plats have been deposited in his office, and that the parties affected thereby are entitled to appeal to the Baltimore City Court.

The ordinance then provides that the City Commissioner shall, when he delivers the lists to the Register, serve printed or written notices on each party taxed or assessed under the ordinance, *although the service of this notice was not a prerequisite of the collection of the assessment.* It is then enacted that any person who may be dissatisfied with any assessment in which he or they are in any manner interested, may, within thirty days after the delivery of the list of property and owners assessed, to the Register, appeal to the City Court and have the assessment there reviewed by a jury, the practice to be similar to that in street appeals, with the same right of appeal to the Court of Appeals of Maryland. If no appeal, or if an appeal, after it is finally disposed of, the Register was required to transfer the assessment lists and explanatory plats to the City Collector, who was required to proceed to collect the assessments in the same manner as he does in the collection of benefits for opening streets.

The requirements of the ordinance were strictly followed by the city officials, and the assessments levied against Mrs. Ulman's land, the plaintiff in error, amounted to $5,873.95.

The plaintiff in error did not question the fact that her property was benefited to an extent as great as its assessment, or avail herself of the right to have the question as to the amount of benefit derived by her property from the improvement, and her fair share of the cost of the improvement, passed on by a Court and jury; but again she laid by until the time for the levying of a distress upon her property had arrived, and then again filed her bill to have the assessment set aside on substantially the same grounds as arose in her first bill, with some additional technical grounds, which we submit do not affect the justness of the claim against her, and which, even if they were tenable, would be utterly devoid of any substantial right or merit.

For the convenience of the Court we have printed as an Appendix to this brief—

1st. Ordinance No. 100 of 1886, under which the paving was done, marked "Exhibit A."

2d. Chapter 284 of Acts of Assembly for 1892, being the legislative authority to levy this assessment, marked "Exhibit B."

3d. Ordinance No. 84, under which this assessment was levied, marked "Exhibit C."

4th. Opinion of the Court of Appeals in this case, marked "Exhibit D."

Argument.

I.

The motion to dismiss for want of jurisdiction should prevail. The sole ground upon which the plaintiff in error relies to maintain her claim that a Federal question

is involved in this appeal is that the Act of 1892, chapter 284, and Ordinance No. 84, are void, because they gave no proper notice or a hearing to the plaintiff in error befere her property was taken in the opening of North avenue, and hence she claims that her property, in violation of the 14th amendment of the Constitution of the United States, was taken without due process of law.

The Court of Appeals of Maryland, in its decision, ("Exhibit D," Appendix,) has construed the law and ordinance in question, and has declared that they did require proper notice to be given to the plaintiff in error, as well as an opportunity for her to be heard before her property was taken.

The Court of Appeals of Maryland, in speaking of the notice and opportunity to be heard given to the plaintiff in error, by the law and ordinance in question, before her property was taken, said:

"The Act of 1892 further provides 'that reasonable notice and an opportunity to be heard shall be given to all persons interested before the final ascertainment of the amount of tax to be paid by any such property.' It required appellant (Baltimore city) to provide for appeals to the Baltimore City Court from the decision of any commissioners or other persons appointed to determine the amount or amounts of such special taxes or assessments, and also for the right of appeal to this Court. The ordinance (No. 84) as shown above, provided for ample notice."

M. & C. C. of Balto. vs. Ulman, 30 Atl. Rep. 45.

See also—Appendix, Exhibit D.

It will therefore be seen, both on the face of the law and ordinance as well as by the express declaration of the Court of Appeals, that the plaintiff in error had open to her, where she had an opportunity to be heard, three different tribunals, Commissioners, Baltimore City Court and Court of Appeals of Maryland, before her property was taken.

This Court has repeatedly held that the conclusion of a State Court as to the proper construction of a State law

or municipal ordinance, especially as to whether a notice and hearing is allowed, is binding on this Court.

In a recent case from Maryland this very question was decided by this Court in an analogous case to the one at bar.

The question arose as to whether a law of State of Maryland, providing for the condemnation of property, which had been invoked by the Baltimore Belt Railroad Company to condemn certain property in Baltimore city, needed for the use of its road, prescribed and provided the required notice.

The case was taken to the Court of Appeals of Maryland, and it held that the law did require notice to be given before condemnation. The case was brought on writ of error to this Court, and on motion to dismiss the writ of error, *the Chief Justice*, speaking for the Court in dismissing the writ, said:

"It was objected below that that section (Sec. 167, Art. 23, P. G. L. of Md.,) violated the 14th amendment of the Constitution of the United States, in that the owner of land condemned thereunder might be deprived of his property without due process of law, because the Act did not provide for any notice to him of the proceedings; but it had been previously decided by the Court of Appeals of Maryland, that the Act properly construed, required notice. Baltimore Belt R. Co. vs. Baltzel, 75 Md. 103. We are bound to accept the conclusion of the State Court as to proper construction of the statute of the State. * * At the time of these proceedings, therefore, notice was required, * * * *and as the want of requirement of notice did not exist, the alleged ground of our jurisdiction fails.*"

The Balto. Traction Co. vs. The Balto. Belt R. Co.,
151 U. S. 137 (38: 102.)

It is, therefore, respectfully submitted that in the face of this express decision of the Court of Appeals, construing said law and ordinance, it is needless to further

discuss the propriety of this Court's granting the motion to dismiss for want of jurisdiction, as it must prevail on the authority of the above case.

II.

As to the motion to affirm. The language of this motion is in the words of 6th rule of this Court, and is as follows:

"Because it is manifest that the appeal is frivolous and merely taken for delay."

If the Court should hold that it has jurisdiction, yet the defendant in error submits that the opinion and decree of the Court of Appeals of Maryland is in plain conformity with the rulings of this Court in the case of Spencer vs. Merchant, 125 U. S. 345. In fact, as the opinion of the Maryland Court shows, it followed implictly Spencer vs. Merchant, as it considered and so declares that said case was binding upon that Court. It, in its first opinion (72 Md. 587), the Court of Appeals reversed its former decisions and declared Ordinance No. 100 void, because of its desire, as expressed, to comply with the rulings of this Court in Spencer vs. Merchant; and its last opinion (Exhibit D, Appendix,) holds Act 1892, chapter 284, and Ordinance No. 84, valid on the strength of same case.

"This being so, the jurisdiction may be said, under the circumstances, to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm."

N. Y. & N. E. R. Co. vs. Bristol, 151 U. S. 566 (38: 269.)

III.

Both the law and ordinance in question, in express terms, on their face, provide for notice and opportunity to be heard to the owners of the property, before their property is taken in the opening of streets, (Exhibits B

and C, Appendix.) So, without a judicial decision by the highest Court of the State and city which passed the law and ordinance, declaring them constitutional, it is respectfully submitted that this Court would, if it had the question originally before it, at once pronounce both valid, and not in violation of the 14th or any other amendment of the Constitution of United States.

All that is necessary to satisfy the requirements of the Federal Constitution is, that the plaintiff in error once had an opportunity to be heard in the apportionment of the tax. This, both the law and ordinance on their face provide.

This plaintiff in error had, in the words of the very language of both the law and ordinance in question, all that Mr. *Justice Jackson* declared, when a Circuit Judge, was necessary. He said:

"The owner must in some form in some tribunal or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened, before the tax becomes final and effectual, in order to constitute such procedure 'due process of law.'"

Scott vs. City of Toledo, 36 F. Rep. 397.

Mr. *Chief Justice Fuller*, in referring to a law of Kentucky providing for an assessment for local improvement, which was attacked upon the same grounds as the law and ordinance in the case at bar, in sustaining motion to affirm, said:

"Unjust, unequal or arbitrary burdens are not authorized to be imposed by the terms of the Act, and opportunity is given to every party interested to be heard in opposition to the enforcement of the liability in the Courts, which are specifically authorized to 'make all corrections, rules and orders to do justice to all parties concerned.'"

Walston vs. Nevin, 128 U. S. 578, (32: 544.)

In Davidson vs. New Orleans, 96 U. S. 104, it was held by this Court, Mr. *Justice Miller* delivering the opinion:

"That whenever, by the law of a State, or by State authority, a tax assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary Courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." * * *

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a Court of justice, according to the modes of proceeding applicable to such a case."

And the conclusion repeatedly reached by this Court is, that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the State authorities are controlled by the Federal Constitution. *So the determination of the taxing district, and the manner of the apportionment are all within the legislative power.*

Spencer vs. Merchant, 125 U. S. 345 (31: 763.)
Stanley vs. Albany Co., 121 U. S. 550 (30: 1003.)
Mobile Co. vs. Kimball, 102 U. S. 691 (26: 238.)
Hagar vs. Reclamation District No. 108, 111 U. S 701, (28: 569.)
U. S. vs. Memphis, 97 U. S. 284 (24: 937.)
Laramie Co. vs. Albany Co., 92 U. S. 307 (23: 552.)

And whenever the law operates alike on all persons and property similarly situated, equal protection can not be said to be denied.

Wurts vs. Hoagland, 114 U. S. 606 (29: 229.)
Richmond F. & P. R. Co. vs. Richmond, 96 U. S. 529 (24: 734.)

The remedy for abuse is in the State Courts. In the language of Mr. *Justice Field* in Mobile vs. Kimball, *supra*, who said:

"This Court is not the harbor in which people of a city or county can find refuge from ill-advised, unequal and oppressive State legislation."

Applying these principles announced by this Court to the law and ordinance, involved in this appeal, it is submitted that the very language in express terms of both the law and ordinance in question provides for all the requirements stated in these cases, and are both valid.

It must, therefore, be apparent that in the language of the motion, this appeal is clearly both "*frivolous*" and "*merely taken for delay*," and the motion to affirm should be granted if the Court should hold it has jurisdiction.

IV.

The decree of the Court of Appeals of Maryland should be affirmed because the validity of the *assessment* of the property of the plaintiff in error under the law of 1892, chapter 284, and ordinance No. 84, is valid and in violation of no principle of Federal law or Constitution. The case of Spencer vs. Merchant fully confirms this proposition, as the following quotations and comments on said case show. In that case *Mr. Justice Gray* said:

"The legislature, in the exercise of its powers of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repaving of a

street, to be assessed upon the owners of land benefited thereby; *and the determination of the territorial district which should be taxed for a local improvement is within the province of the legislative discretion.*"

Spencer vs. Merhant, 125 U. S. 345, (31: 763.)
See also, Balto. & Greenmount Cemetery Co., 7 Md. 536.
Baltimore vs. Ulman, 72 Md. 611.
Davidson vs. Orleans, 96 U. S. 97, (24: 616.)
Paulsen vs. Portland, 149 U. S. 40, (37: 637.)

Again, in the opinion, Mr *Justice Gray* said:

"It is also within the untrammelled discretion of the Legislature to determine the amount to be raised by the special tax and the property from which it is to be raised. This can be done either directly by the Legislature itself, or they can commit the finding of these facts to commissioners."

Spencer vs. Merchant, 125 U. S. 345, (31: 763.)
Spencer vs. Merchant, 100 N. Y. 585.

The case of Spencer vs. Merchant, as has been before stated in this brief, was recognized as a controlling authority by the Court of Appeals of Maryland, for it was upon its authority that the case between these same parties was decided in 72 Md. 587, and the former settled policy of the Court, in regard to local assessments, was overruled. The facts in Spencer vs. Merchant are very similar to those at bar; they are as follows:

Acting under the provisions of the statutes of 1869, chapter 217, of the State of New York, as amended by chapter 619 of the statutes of 1870, of the same State, certain commissioners laid out, regulated, graded and paved for travel, a street in the town of New Lots, and levied local assessments on the abutting property. The owners of some of the property resisted the payment of the tax, and after a long litigation, the Court of Appeals of New York in the case of *Stuart vs. Palmer*, 74 New York, 183, on June 18th, 1878, declared the assessment void on the

ground that there was no notice and no opportunity to be heard as to his proper proportion of the tax, given to the property holder by the statute.

By the Act of August 12, 1881, chapter 689, the Legislature of New York directed the supervisors of King's county, in which the town of New Lots was situated, to levy on the assessment roll the amount of the unpaid tax with interest. Before proceeding to levy such sums, the supervisors were to apportion the same upon the property attempted to be assessed under the void Acts of 1869 and 1870.

This new Act made ample provision for notice, and gave an opportunity to be heard as to the proportion of the tax which each piece of property ought to bear.

Its validity was attacked on two grounds; first, that the statute gave no hearing as to the amount of the tax to be levied; second, that the assessments were levied irrespective of benefits to the lots assessed. The Act was, however, upheld by both the Court of Appeals of New York, and by the Supreme Court of the United States, in the two cases of *Spencer vs. Merchant, Supra.*

Judge Finch, of the Court of Appeals of New York, stating:

"The Legislature may commit the ascertainment of the sum to be raised and of the benefited district, to commissioners, but is not bound to do so, and may settle both questions for itself; and *when it does so its action is necessarily conclusive and beyond review.*"

100 N. Y. 587.

Again, on page 588, in speaking of the objection that the only hearing given to the land owner relates to the apportionment of the fixed amounts among the lots assessed, and that no hearing is given as to the aggregate to be collected, he says:

"No hearing would open the discretion of the Legislature, or be of any avail to review or change it. A hearing is given by the Act as to the apportionment among land owners, which furnishes to them an opportunity to raise all pertinent and available questions and dispute their validity, or its amount and extent." "Certainly," says the Court, "if the Acts of 1869 and 1870 had never been passed, but the improvement of Atlantic avenue had been ordered, the Legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another."

"Practically, just that was done in this case. In the matter of Van Antwerp to Vacate (56 N. Y. 26), an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property owners. The Legislature made a re-assessment, imposing two-thirds of the expense upon a benefited district and one-third upon the city at large. *The Act was held valid as a new assessment, and not an effort to validate a void one.*" (Page 588.)

Not only was this ruling affirmed by the Supreme Court, but the very words of the opinion were adopted. 125 U. S. 352.

Spencer vs. Merchant has itself been frequently quoted with approval by this Court.

Paulsen vs. Portland, 149 U. S. 40, 41 (37: 637.)
Lent vs. Tillson, 140 U. S. 328 (35: 419.)
Budd vs. New York, 143 U. S. 546 (36: 247.)
Palmer vs. McMahon, 133 U. S. 669 (33: 772.)
Walton vs. Nevin, 128 U. S. 582 (32: 544.)

In pursuance of the taxing powers thus declared to be possessed by the State, chapter 284 of the Acts of 1892, was drawn. This Act, as stated on a former page of this brief, gave the Mayor and City Council of Baltimore power to provide "in such manner as they may deem proper" for levying a tax upon all the property binding on any street which has been improved by paving and grading, and which had escaped the assessment levied under

the ordinance requiring the paving or grading to be done, "to the extent that such property shall have been specially benefited by such improvement;" then, after providing that no property which had paid the assessment originally made for its share of the cost of the improvement shall be again assessed, it is enacted that reasonable notice and an opportunity to be heard shall be given to all persons interested before the final ascertainment of the amount of tax to be paid by any such property, with a provision for a jury trial in the Baltimore City Court and an appeal to the Court of Appeals. Can it be said, with any show of reason, that this statute is not well within the rule laid down in *Spencer vs. Merchant?* Did not the Legislature, in the exercise of its manifest power, simply determine *the extent of the new taxing district*, viz: That it should consist of property binding on the paved street, and which had escaped paying the original assessment for the improvement of which it had necessarily enjoyed the benefit? And that, so careful was it of the rights of the property-holders, the tax should only extend to "the extent that such property shall have been specially benefited by such improvement," with a clause in the law that on the amount of this extent a jury trial could be had, with an appeal to this Court.

It can be safely asserted that no objection can be made to the terms of this statute by any persons who are willing to pay taxes at all. Afterwards, as already stated, in pursuance of this power, Ordinance 84, of April 29th, 1893, was passed. This ordinance, after reciting in the preamble the attempt to collect the assessment under Ordinance 100, of 1886, and the passage of the enabling Act of 1892, requires the City Commissioner to give ten days' notice in two daily papers, (which notice by publication was clearly sufficient, Paulsen, 149 U. S. 40, Lent vs. Tillson, 140 U. S. 316, 328), that on a given day he will apportion the unpaid portion of the cost of grading and paving North avenue, with interest thereon from the time

it was paid for by the Mayor and City Council of Baltimore until the day of making such apportionment, among the pieces of property binding on that portion of North avenue which had so far avoided payment of the original assessment, "*provided, however, the tax assessed against any piece of property shall not be more than the amount which said property has been specially benefited by the grading, paving and kerbing of said portion of North avenue.*" The ordinance then gave the City Commissioner authority to adjourn from time to time, if necessary, to give all parties an opportunity to be heard, and directed him, "after hearing the different parties interested," to make out duplicate lists of the property assessed, "and of the owners or reputed owners thereof," with explanatory plats, and deliver the same to the City Register.

The City Register then, as we have before shown, gives notice by advertisement for five days "that the parties affected thereby are entitled to appeal therefrom by petition in writing to the Baltimore City Court." Then the City Commissioner is directed to serve written or printed notices on each and every party or parties assessed or taxed under this ordinance, although the failure to serve these notices is not a prerequisite to the collection of the assessment or tax. Then the practice in trying street appeals is followed.

It surely cannot be objected that under this ordinance reasonable notice is not given to the property holder, or that he has not the amplest opportunity to be heard. The ordinance is prolix and cumbersome in its anxiety to give the broadest and fullest notice and hearing. And then the ordinance specially limits the tax to the amount of special benefit received from the improvement. While the record shows that the City Commissioner and the other city officials have followed literally and minutely the directions and requirements of the ordinance, and that, therefore, if the Act of Assembly and ordinance are valid, as we think they are, these proceedings could

not be successfully questioned in a direct proceeding by an appeal to the City Court and a motion to quash the proceedings or other appropriate proceeding in that tribunal, it is proper that the fact should be pressed upon the Court that, as this is a collateral attack upon the proceedings, no defect can be taken advantage of, except a *jurisdictional one*, one which shows that the proceedings are not only *erroneous*, but absolutely *void*. Where there is a special tribunal erected to correct defects or errors in tax assessments, and it has jurisdiction in the premises, the parties deeming themselves aggrieved must invoke that special jurisdiction, and cannot appeal to a Court of Equity to correct mere errors or irregularities in the proceedings.

O'Neil vs. Bridge Co., 18 Md. 1.
Baltimore vs. Canton Co., 63 Md. 238.
County Commissioners of Allegany Co. vs. Mining Co., 61 Md. 548.
Gott vs. Carr, 6 Gill and Johnson, 309.

The defendant in error, for the reasons stated in this brief, ask that this appeal be dismissed, and if the Court should consider it had jurisdiction, then that the Court will affirm, "*because it is manifest the appeal is frivolous and merely taken for delay.*"

Respectfully submitted,

THOMAS G. HAYES, *City Counselor for Baltimore,*
WM. S. BRYAN, JR., *City Solicitor for Baltimore,*
Counsel for Defendant in Error

APPENDIX.

"EXHIBIT A."

Ordinance No. 100 of 1886.

An Ordinance to provide for grading, paving and kerbing North Avenue between Pennsylvania Avenue and the western city limits.

Section 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That the City Commissioner be and he is hereby authorized and directed to have all that part of North avenue between Pennsylvania avenue and the western city limits graded, paved and kerbed, in pursuance of the Act of Assembly, Chapter 218, of April 2, 1874, and according to the provisions of Article 47, of the Baltimore City Code, title "Streets and City Commissioner," sub title "Grades, Grading, Paving, &c.," providing for the grading, graveling, shelling, kerbing, paving, re-paving, &c., of streets, lanes and alleys in the city of Baltimore, so far as the same may be applicable; the expense thereof to be assessed, as provided in said Article 47, section 34, in regard to paving and re-paving done under the provisions of said article, upon the owners of property binding on said avenue in proportion to the number of front feet owned by them respectively on the portion of said avenue hereby directed to be paved; provided, that the City Commissioner shall not proceed to act under this ordinance until the damages awarded for the opening of said part of said avenue shall have been paid or tendered to the owners of said part so condemned and opened, or invested for the use of such owners, as now provided by Article 47, section 16, of the Baltimore City Code.

"EXHIBIT B."

Act of 1892, Chap. 284.

An Act to authorize the Mayor and City Council of Baltimore to levy special assessments, and to provide for the collection thereof, upon property binding on any street, lane or alley of

said city or part thereof, which may have been graded, paved or curbed, or regraded, repaved or recurbed under any ordinance or ordinances of the Mayor and City Council, which ordinance provided for assessing the whole or any portion of the cost of such work upon the property binding upon such street, lane or alley, or part thereof, and which assessments from any cause have not been fully collected by said Mayor and City Council.

WHEREAS, certain streets, lanes and alleys, or parts thereof, in the city of Baltimore, have been graded, paved or curbed, or regraded, repaved or recurbed, under ordinances of the Mayor and City Council, which provided for the assessment of the whole or certain portions of the cost of such work upon the property binding on such streets, lanes or alleys, or parts thereof, so improved, some of which assessments have been paid, and other portions thereof remain uncollected, although the Mayor and City Council have paid the whole cost of such improvments.

AND WHEREAS, it is just and proper that all property which may have been benefited by such work should pay its proper proportion of such cost, to the extent that such property may have been specially benefited, therefore;

SECTION 1. Be it enacted by the General Assembly of Maryland, That in any and all cases where any street, lane or alley, or any part thereof, in the city of Baltimore, has been graded, paved or curbed, or regraded, repaved or recurbed, under any ordinance which provided for assessing the whole or any portion of the cost of such improvement upon the property binding on such street, lane or alley, or part thereof, and such assessments, or any part thereof, remain unpaid, it shall be lawful for the Mayor and City Council of Baltimore to provide by ordinance for the levy and collection in such manner as they may deem proper, of a tax upon all the property binding upon any street, lane or alley, or part thereof, which may have been so improved, to the extent that such property shall have been specially benefited by such improvement; provided that no property upon which the assessment originally made for its share of the cost of

such improvement shall have been paid, shall be again assessed, and that reasonable notice and an opportunity to be heard shall be given to all persons interested before the final ascertainment of the amount of tax to be paid by any such property; and the said Mayor and City Council shall provide for appeals to the Baltimore City Court by any person or persons interested, including the Mayor and City Council themselves, from the decision of any commissioner or commissioners, or other persons appointed to determine the amount or amounts of such special taxes or assessments; and in the trial of such appeals the practice shall conform as near as may be to the practice in the trial of street appeals, including the right of appeal to the Court of Appeals.

SEC. 2. And be it enacted, That this act shall take effect from the date of its passage.

"EXHIBIT C."

Ordinance No. 84 of 1893.

An Ordinance to provide for the levying of a tax upon property binding upon North avenue, between Pennsylvania avenue and the western City Limits, which did not pay the assessment assessed under Ordinance No. 100, approved June 24th, 1886.

WHEREAS, by an ordinance, No. 100, approved June 24th, 1886, entitled "An ordinance to provide for grading, paving and kerbing North avenue, between Pennsylvania avenue and the western City limits, provision was made that all that part of North avenue between Pennsylvania avenue and the western City limits, should be graded, paved and kerbed, and that the expense thereof should be assessed upon the owners of property binding on said avenue in proportion to the number of front feet owned by them respectively of the said portion of the said avenue hereby directed to be paved, in accordance with Section 34 of Article 47 of the Baltimore City Code of 1879; and after the work had been done by the City Commissioner, and some of the property holders had paid the amount assessed

against them, the Court of Appeals of Maryland, in a suit instituted to resist the collection of the said assessment, declared the said assessment to be null and void, and therefore a large portion of the cost of such grading, paving and kerbing of North avenue, between Pennsylvania avenue and the western City limits, has never been paid to the Mayor and City Council of Baltimore; and

Whereas, By Chapter 219 of the Acts of 1892, full power and authority is given to the Mayor and City Council of Baltimore to provide by ordinance for the levy and collection, in such manner as they may deem proper, of a tax upon all property binding upon any street, lane or alley, or part thereof, which may have been so improved to the extent that such property shall have been specially benefited by such improvement; provided, that no property upon which the assessment originally made for its share of the cost of such improvement shall have been paid, shall be again assessed, and that a reasonable notice and an opportunity to be heard shall be given to all persons interested, before the final ascertainment of the amount of tax to be paid by any such property; now, therefore,

Section 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That the City Commissioner be authorized and directed to give ten days' notice, in two of the daily newspapers published in the City of Baltimore, that on the day and at the time and place mentioned, he will ascertain and determine the amount of tax to be assessed upon all property binding on North avenue, between Pennsylvania avenue and the western City limits, and which did not pay the assessment levied upon it under Ordinance No. 100, approved June 24, 1886, for the special benefits which have been derived by said property from the grading, paving and kerbing of said portion of North avenue, on the day and at the place named; after hearing all persons interested who may desire to be heard, he shall proceed to apportion among the different pieces of property binding on said portion of North avenue, and upon which there has not been paid the assessment levied under Ordinance No. 100, approved June 24, 1886, the total cost of the grading, paving and kerbing of the said portion of North avenue, with interest

thereon, from the time the same was paid for by the Mayor and City Council of Baltimore to the day the City Commissioner makes such apportionment, less the amount which has been paid by the holders of the pieces of property binding on the said portion of North avenue who paid the assessments levied under the said Ordinance No. 100, approved June 24, 1886; provided, however, the tax assessed against any piece of property shall not be more than the amount which said property has been specially benefited by the grading, paving and kerbing of said portion of North avenue; and the City Commissioner may adjourn from time to time, if necessary, to give all parties an opportunity to be heard, and after hearing the different parties interested, he shall make out a list of the property and of the owners or reputed owners thereof, liable to pay the tax and the amount to be paid by each piece of property, and shall deliver to the City Register a duplicate list thereof, under his hand, together with such explanatory plat or plats, if any, as may be necessary to designate the property upon which said tax or assessment is levied, which taxes shall be liens upon the several pieces of property upon which the same shall respectively be assessed.

Sec. 2. And be it further enacted and ordained, That it shall be the duty of the City Register, within five days after the said proceedings shall have been deposited in his office, to notify all persons interested, by an advertisement to be inserted once a week for two successive weeks in two of the daily newspapers of the City, that the said assessment and explanatory plat or plats have been so placed in his office, and that the parties affected thereby are entitled to appeal therefrom by petition in writing to the Baltimore City Court.

Sec. 3. And be it further enacted and ordained, That it shall be the duty of the City Commissioner to serve written or printed notices on each and every party or parties assessed or taxed under this ordinance; provided, however, that the service of such notice shall not be so construed as to be one of the prerequisites to the collection of the said assessment or tax.

Sec. 4. And be it further enacted and ordained, That any person or persons, including the Mayor and City Council of Baltimore, who may be dissatisfied with any assessment in which he

or they are in any manner interested, may, within thirty days ofter the return of the above-mentioned list of the property and owners or reputed owners thereof, liable to said tax or assessment by the City Commissioner, to the City Register, appeal therefrom by petition to the Baltimore City Court, praying said Court to review the same, and thereupon, the proceedings shall be similar to those in the case of the trial of street appeals, and the same right shall be had to appeal to the Court of Appeals.

Sec. 5. And be it further enacted and ordained, That if no appeal shall have been prayed, then within ten days after the time hereinbefore limited therefor, or after the return of the final decision upon any such appeal or appeals shall have been made to the Register, the said Register shall transfer the said list received from the City Commissioner to the City Collector, who shall thereupon proceed in all respects, as he does in cases where persons or property are assessed for benefits for opening, closing, widening and straightening any street, lane or alley.

Sec. 6. And be it further enacted and ordained, That this ordinance shall take effect from the date of its passage.

"EXHIBIT D."

MAYOR &C. OF BALTIMORE	COURT OF APPEALS OF MARYLAND.
vs.	
CLEMENTINE ULMAN, &C.	*April Term*, 1894.

Judge Boyd delivered the opinion of the Court.

In the year 1887, the authorities of the City of Baltimore, graded, paved and curbed North Avenue, between Pennsylvania Avenue and the western city limits. This was done under what was known as Ordinance No. 100 of 1886, passed under the supposed authority of 1874, ch. 218. In Ulman vs. Mayor, &c.,

72 Md. 587, this Court decided that the assessment levied on Mrs. Ulman's property under that ordinance, was null and void, as it made no provision for notice to, and hearing of any proprietor whose land adjoined North Avenue, upon the question, what proportion of the tax should be assessed upon his land, and hence was taking property without due process of law. The majority of the judges who sat, were of the opinion that the case of Spencer vs. Merchant, 125 U. S. 345 was applicable, and being a federal question, this Court was bound by it, and hence felt constrained to overrule a number of cases which had been decided by this Court. The Legislature, at its first session after the decision of the Ulman case, passed two acts, ch. 219 of the laws of 1892 being amandatory to sec. 810 of art. 4 of Public Local Laws (which was a codification of Act of 1874, ch. 218,) and ch. 284 of the laws of 1892, authorizing the Mayor and City Council of Baltimore to levy special assessments and to provide for the collection thereof upon property binding on any street, &c. which had been graded, &c. under any ordinance which provides for assessing the whole, and any fractions of the costs of such work upon the property binning on such street, &c., and which assessment for any cause had not been collected. The Mayor and City Council passed an ordinance known as No. 84 of 1893, which, after referring to the passage of Ordinance No. 100 of 1886, what was done under it, the decision of this Court declaring the assessment null and void, and to the passage of ch. *219*, (claimed by the appellant to mean ch. *284*) of the Act of 1892, in substance directed:

1. The City Commissioners to give ten days' notice in two of the daily newspapers published in Baltimore, that at the time and place mentioned, he would ascertain and determine the amount of tax to be assessed upon all the property binding on North Avenue, between Pennsylvania Avenue and the western city limits, upon which the assessment levied under Ordinance No. 100, had not been paid for the special benefits which had been derived by said property for the grading, &c. of said portion of North Avenue, that he might adjourn from time to time to give all parties an opportunity to be heard, and after the hearing he was required to make out a list of the property and

the owners, together with the amount to be paid by each piece of property, and deliver a copy, with an explanatory plat, to the City Register, and then provided that such taxes should be liens.

2. That the City Register, within five days after the proceedings were left in his office, should notify all persons interested, by advertising once a week for two successive weeks, in two of the daily newspapers in the city, that the said assessments and explanatory plats had been so placed in his office, and that the parties affected thereby were entitled to appeal to the Baltimore City Court.

3. That the City Commissioners should serve written and printed notices on each party so assessed or taxed, but that service of such notice should not be construed a prerequisite to the collection of the tax.

4. That any person dissatisfied with any assessment, in which he was in any manner interested, could appeal to the Baltimore City Court, where the proceedings should be similar to those in the case of trials of street appeals, and the same right should be had to appeals to the Court of Appeals.

5. That within ten days after the time limited for appeals and after the decisions in cases of appeal, the City Register should turn over the lists to the City Collector, who should proceed in all respects as he does in cases where persons or property are assessed for benefits for opening, closing, etc., any street, lane or alley. The appellee filed a bill giving a history of the several Acts of Assembly and ordinances alleging that the City Collector was about to sell his property for the want of payment of the assessment alleged to have been made under Ordinance No. 84, and claiming that the Act of 1892, chapter 284 and Ordinance No. 84 were null and void. The bill prays that said Act, Ordinance No. 84, and assessment under it, be declared null and void; that all the proceedings in making said assessment be vacated and set aside; that the appellant and City Collector be enjoined. A number of objections to the Act of Assembly, ordinance and proceedings thereunder, are stated in the bill, which will be hereinafter passed upon.

The appellant filed her answer admitting, for the most part, the history of the proceedings as stated in the bill, but alleged that the Act of Assembly, ordinance, and all proceedings under them, were valid. The case was submitted to the Court below on the bill and answer, and a decree *pro forma* was passed declaring Ordinance No. 84 and the assessment thereunder null and void, and perpetually enjoined the collection of the assessment. From the *pro forma* decree an appeal was taken by the city, some of the objections urged by the appellee questioned the validity of chapter 284 of the Act of 1892 and Ordinance No. 84, whilst others only apply to the method of proceeding on the right to recover, if the statute and ordinance be valid. As the former class of objections attacks the very foundation of the assessment, we will consider them first, without attempting, however, to wholly distinguish the two classes on some points raised. The first question that naturally suggests itself is—had the Legislature power to pass any statute to accomplish the purpose indicated in the preamble of this act? The case of Spencer vs. Merchant, (*supra.*) clearly establishes that it had. It is not necessary to discuss how far such a law could effect property that had been *bona fide* transferred from the owner of the property, at the time the work was done, to some one who had no notice that the property was liable to such a claim, as in this case the title remained in the person whose property is alleged to have specially benefited. He must, therefore, go a step further and enquire into the validity of this particular statute.

In the opinion delivered on the motion for a rehearing in Ulman's case, we expressly stated, on pages 610 and 611, that there was ample power in the original Act of 1874, chapter 218, to enable the city to pass ordinances that would not be subject to the constitutional objections passed on in that case. On page 593, it quotes from Spencer vs. Merchant, where it was said that, "If the Legislature provided for notice to and hearing of each proprietor at *some stage of the proceedings*, upon the question, what proportion of the tax shall be assessed on his land, there is no taking of his property without due process of law." And on page 594, in further quoting from that case, it was said: 'The S tatute of 1881 (being the one in controversy) afforded the owners notice and hearing of the question of the equitable

apportionment among them, and thus enabled them to contest the constitutionality of the statute—*and that was all the notice and hearing to which they were entitled.*" The Act of 1892 authorized the appellant "to provide by ordinance for the levy and collection, in such manner as they may deem proper, of a tax upon all the property binding upon any street, lane or alley, or part thereof, which may have been so improved to the extent that such property shall have been specially benefited by such improvement; provided, that no property upon which the assessment originally made for its share of the costs of such improvement shall have been paid, shall be again assessed." The requirements of the Act are to take the total assessment formerly made for improvements, then deduct the amount paid, and assess the balance on the properties within the definite limits, to the extent that they have been, respectively, specially benefited by the improvement. That was as certain as if the Legislature had named a definite sum to be assessed on those who had not paid, on North avenue or any other street where a similar condition of things existed. The objection of appellee that no hearing is given by the statute as to the aggregate sum to be collected, was raised and distinctly answered in Spencer's case, on page 558. The Act of 1892 further provides: "That reasonable notice and an opportunity to be heard shall be given to all persons interested, before the final ascertainment of the amount of tax to be paid by any such property. It requires appellant to provide for appeals to the Baltimore City Court, from the decisions of any commissioners or other persons appointed to determine the amount or amounts of such special taxes or assessments, and also for the right of appeal to this Court. The ordinance, as shown above, provided for ample notice. Ulman's case, on page 611, authorizes notice by summons or through the newspapers. Thus we see that appellee has ample opportunity to have a jury pass upon the assessment, against his property, as well as, to have the Court below, and this Court, on appeal, determine the legality of the proceedings, including the validity of the statute and ordinance. We are of the opinion that Spencer vs. Merchant, and the former case between these parties fully sustains the validity of the statute,

and also of the ordinance, unless there be some technical objections to the latter.

We will now pass upon other class of objections urged by appellee. Without meaning to decide that the appellee could, in a bill for an injunction, properly ask the benefit of the statute of limitations, we have no doubt that is not a bar to the assessment. It was only made a few months before the bill was filed, and no action accrued until the right to sue on it had matured.

It is contended by appellee that inasmuch as Ordinance No. 100 was declared to be null and void, the grading, curbing and paving of North Avenue were without any legal sanction, and void, and that no valid assessment for the cost thereof could consequently be made.

The case of Spencer vs. Merchant, so frequently cited by us because we deem it conclusive on so many of the points raised in this case, would seem to dispose of that objection. Porter's case in 18 Md. 300, cited by appellee's counsel, certainly does not sustain his contention. There the city authorities undertook to correct the error which the Court had determined had made the proceedings void, by passing an ordinance to confirm the grading and to ratify the acts of the City Commissioners. This Court, on the page cited, shows very clearly why that ordinance was not of binding force, because of its "not being authorized by any law." And in Horn's case, 30 Md. 222, which was a suit against the city for injuries done to his property in grading that avenue, the Court decided that the city was not liable, as the acts done were *ultra vires*.

In referring to the ordinance above mentioned, it said: "If the act was void because *ultra vires*, and they had no power to authorize it before it was undertaken and commenced, they certainly had no power to adopt it after it was done."

Nor can we agree with the appellee's counsel, that because Ordinance No. 100 was determined to be void, the Act of 1872, so far as applicable to the assessment was unconstitutional, null and void, being an exercise of judicial power, in violation of the 8th and 23d articles of the declaration of rights. To sustain this, he cites Horner's case, 26 Md. 206. After the decision in

Porter's case, which also disposes of a similar case of Horn et al., the Legislature undertook to authorize the city to collect the *same assessments* that this Court had determined could not be collected. As was said in Horner's case, in referring to that Act of the Legislature: "It, in effect, and that most plainly, reversed the judgment of this Court." Of course that could not be permitted. But that was not what was done in this case. The Court simply determined that the ordinance and assessment then in controversy were null and void, and in pursuance of the decision, the Court below so decreed and enjoined the appellant and its collector from collecting or in any way enforcing said assessment. The Act of 1892 provides for the collection of an assessment to be made to the extent that the property was specially benefited, not the original assessment but a new one, and not necessarily the same amount, for it might have been different if appellee had seen fit to appeal before the commissioners or submit his case before a jury.

As is said, Mills vs. Charlton, 29 Wis. 400: The original proceedings having failed, for reasons which the legislature may lawfully obviate, and the basis for taxation still remaining, namely, the public benefit for improvement received, for which the legislature says the property of a citizen shall pay, a re-assessment may be authorized. But on this point, we might have also have contented ourselves by referring to Spencer vs. Merchant.

Considerable stress has been laid on the point made by the learned counsel for the appellee, that the ordinance is void, by reason of the failure to give the ten days' notice required by the Act of 1892, chapter 219, to be given, before the passage of an ordinance requiring the cost of paving, &c., streets to be assessed upon the property. He first notes the fact that the ordinance itself refers to that chapter.

It true that in is the preamble reciting the sources of the authority of the city to pass the ordinance, it is stated: "Whereas, by chapter 219 of the Acts of 1892, full power is given, &c., but the rest of the preamble itself, shows conclusively that it was a mere clerical error, and that chapter 284 was intended. But if this were not so, a misrecital, in an ordinance of the source of the power of the municipality, could not affect its validity, if, in

point of fact, the power to enact it existed. The real question raised by the point, is whether or not chapter 219 is applicable to ordinance No. 84, so as to require the notice therein provided for. Chapter 284 of Laws of 1892, was passed four days after chapter 219. It did not intend and evidently was not intended to repeal chapter 219, which simply amended the local law of the city, providing for the grading and improving of any street, alley or lane, after it was opened. A careful examination of the two chapters, convinces us that the notice required in chapter 219, is not and was not intended to be applicable to ordinances passed in pursuance of chapter 284. Chapter 219 gives the appellant power to provide by ordinance for improving as therein stated, and for assessing the cost of any such work, in whole or in part, upon the property binding upon such streets, and for collecting the assessment; "provided, that before the passage by either branch of the Council, of any ordinance requiring the whole or any portion of the costs to be assessed upon the property, ten days' notice shall be given, &c." It is perfectly apparent that this legislation only applied to ordinances for such grading or other authorized work as was to be *done after the passage of the Act.* The object of the notice was to give an opportunity "to all persons interested therein to appear and be heard before some appropriate committee of the Council," as to the grade character of the work, whether the costs should be wholly or in part only borne by the property binding upon the street; whether the work should be done at all, &c. That Act provided for ordinances *for the work*, as well as for the assessment and collection of the costs thereof, whilst chapter 284 provides for the assessment and collection of the costs *for work already done* by the city. Hence, the latter Act only required a notice before the final assessment of the amount of tax to be paid by any such property.

The position that the Act of 1892, chapter 284, and ordinance No. 84, only applied to cases where valid assessments had been made, is not supported by a reasonable construction of the Act. It does not use the term "valid assessments," and if it was intended to apply only to assessments that were *valid*, it would have been of little, if any, use, as the Act would not be necessary to enforce *valid* assessments. The question raised as to the interest charged need

not be passed upon by us further than to say, that, as we have held the statute, an ordinance valid, a Court of equity could not give the complainant relief for any such alleged irregularities; she had the right to make such objections, before the tribunal, provided for under the ordinances, but not collaterally or by such a proceeding as this. The cases to that effect are very numerous in this State. We will only refer to O'Neil vs. Bridge Company, 18 Md. 1; County Commissioners vs. Union Mining Co., 61 Md. 548; and Greenland vs. County Commissioners, 68 Md. 59.

We have considered at some length the points raised by the bill, that have been pressed by counsel, with the exception possibly of one or two, which are disposed of by what we have said above, or at least are met by the case of Spencer vs. Merchant.

There is still another question, which was presented in argument, although not given in the bill, as a reason for the interposition of a Court of equity—that is the right of the City Collector to sell the property of the appellee.

The Act of 1892 authorizes the city to "provide by ordinance for the levy and collection, in such manner as they may deem proper, of a tax upon all the property binding, &c." The ordinance, after requiring the lists to be placed in the hands of the City Collector, directs him to "thereupon proceed in all respects as he does in cases where persons or property are assessed for benefits for opening, closing, widening and straightening any street, lane or alley."

Section 806 of article 84 of the Public Local Laws, is the statute law on the latter subject. It does not prescribe the mode of procedure for the collection of such benefits, but authorizes the appellant "to enact and pass all ordinances from time to time, which shall be deemed necessary and proper, to exercise the powers and effect the objects above specified."

From an examination of the ordinances of the city of Baltimore, we find that the appellant has full power to sell for benefits for opening, closing, widening and straightening any

street, lane or alley. Hence the appellant has full and ample power to sell the property of the appellee for the assessment made under Ordinance No. 84.

It follows from what we have said, we must reverse the *pro forma* decree, the injunction must be dissolved and the bill dismissed.

Decree reversed, and the bill dismissed with costs to the appellant.

CLEMENTINE ULMAN, By her next Friend ALFRED ULMAN, *Plaintiff in Error,* *vs.* MAYOR AND CITY COUNCIL OF BALTIMORE, *Defendant in Error.*	IN THE SUPREME COURT OF THE UNITED STATES. Term No. 806. *October Term, 1894.*

To MOSES R. WALTER, ESQ.,

Counsel for Plaintiff in Error.

We herewith hand you copies of motion to dismiss and affirm in the above entitled case, together with copies of brief in support thereof, and Exhibits attached to said brief, and notify you that the same will be filed in the Supreme Court of the United States on Monday the 3d day of December, 1894.

Very respectfully, yours,

THOMAS G. HAYES,
City Counselor for Baltimore,

WILLIAM S. BRYAN, JR.,
City Solicitor for Baltimore,
Counsel for Defendant in Error.

Service of the copy of the above motion to dismiss and affirm, and of the brief with Exhibits attached, and the date of filing the same, admitted this 3rd day of November, 1894.

MOSES R. WALTER,
Counsel for Defendant in Error.

165-719

Office Supreme Court, U. S.
FILED
OCT 29 1896
JAMES H. MCKENNEY,
CLERK.

165-719

IN THE

Supreme Court of the United States.

No. 174. **OCTOBER TERM, 1896.**

In Error to the Court of Appeals of the State of Maryland.

CLEMENTINE ULMAN,
By her Husband and next friend ALFRED J. ULMAN,
Plaintiff in Error,

vs.

THE MAYOR & CITY COUNCIL OF BALTIMORE
AND LEWIS N. HOPKINS, City Collector,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

M. R. WALTER,
Counsel for Plaintiff in Error.

IN THE

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No. 174. **OCTOBER TERM, 1896.**

In Error to the Court of Appeals of the State of Maryland.

CLEMENTINE ULMAN,

By her Husband and next friend ALFRED J. ULMAN,

Plaintiff in Error,

vs.

THE MAYOR & CITY COUNCIL OF BALTIMORE AND LEWIS N. HOPKINS, City Collector,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

In 1886, the Mayor and City Council of the City of Baltimore, by virtue of the Act of 1874, chapter 218, of the General Assembly of Maryland, passed Ordinance No. 100, (Record, pages 4 and 5) to grade, pave and kerb North avenue, between Pennsylvania avenue and the western City limits, and to assess the cost thereof on all the owners of property binding on said avenue, in proportion to the number of front feet owned by

them, respectively, on the portion of said avenue directed to be paved. The work was done, and the cost assessed as aforesaid on the said owners, among whom was the plaintiff in error. (Record page 5.) A number of owners paid the amount so assessed against them. The plaintiff in error, however, refused, and upon a bill filed by her in the Circuit Court of Baltimore city, it was held, after an appeal to the Court of Appeals of Maryland, (72 Md. 587,) that Ordinance No. 100 was unconstitutional, and the assessment against her void, by the following decree, (Record, page 15):

"This cause standing ready for hearing, and having been submitted by the counsel for the respective parties, and the proceedings having been read and considered, it is thereupon, this 13th day of March, in the year 1893, by the Circuit Court of Baltimore City, adjudged, ordered and decreed, in conformity with the opinion of the Court of Appeals upon the appeal heretofore taken in this cause, and by direction of the said Court of Appeals, that Ordinance No. 100, of 1886, passed by the Mayor and City Council of Baltimore, is unconstitutional, null and void, and that the assessment of $4,629.32 made thereunder, against the complainant in these proceedings mentioned, is also null and void.

"And it is further adjudged, ordered and decreed, in conformity with the said opinion of, and by direction of the said Court of Appeals, that the said Mayor and City Council of Baltimore and Lewis N. Hopkins, be and they are hereby perpetually enjoined and restrained from collecting said assessment and from distraining upon, executing and selling the property of the said complainant, for the purpose of collecting said assessment, or from enforcing said assessment in anywise or manner whatsoever."

At the session of the Maryland Legislature, held in 1892, two Acts were passed in reference to paving in Baltimore city. One, chapter 219, repealed and re-enacted the Act of 1874, chapter, 218, (Record, page 6, and appendix to this brief, page 17) and the other, chapter 284 (Record, pages 6 and 7, and appendix to this brief, page 18) was entitled:

"An act to authorize the Mayor and City Council of Baltimore to levy special assessments, and to provide for the collection thereof upon property binding on any street, lane or alley of said city, or part thereof, which may have been graded, paved or kerbed, or regraded, repaved or rekerbed under any ordinance or ordinances of the Mayor and City Council, which ordinance provided for assessing the whole or any portion of the cost of such work upon the property binding upon such street, lane or alley, or part thereof, and which assessments from any cause have not been fully collected by said Mayor and City Council."

And provided:

"That in any and all cases where any street, lane or alley, or any part thereof, in the city of Baltimore, has been graded, paved or kerbed, or regraded, repaved or rekerbed under any ordinance which provided for assessing the whole or any portion of the cost of such improvement upon the property binding on such street, lane or alley, or part thereof, and such assessments or any part thereof remain unpaid, it shall be lawful for the Mayor and City Council of Baltimore to provide by ordinance for the levy and collection, in such manner as they may deem proper, of a tax upon all the property binding on any street, lane or alley, or part thereof, which may have been so improved to the extent that such property shall have been specially benefited by such improvement; provided, that no property, upon which the assessment originally made for its share of the cost of such improvement shall have been paid, shall be again assessed, and that a reasonable notice and an opportunity to be heard shall be given to all persons interested before the final ascertainment of the amount of tax to be paid by any such property; and the said Mayor and City Council shall provide for appeals to the Baltimore City Court by any person or persons interested."

By virtue of this Act of Assembly, chapter 284, the Mayor and City Council of Baltimore, on April 20th, 1893, passed Ordinance No. 84, which is set out in full in the appendix to this brief, page 20.

This ordinance is entitled:

"An ordinance to provide for the levying of a tax upon property binding on North avenue, between Pennsylvania avenue and the western city limits, *which did not pay the assessment assessed under Ordinance No. 100, approved June 24th, 1886.*"

And provides that *the City Commissioner should*

"A*pportion among the different pieces of property binding on said portion of North avenue and upon which there has not been paid the assessment levied under Ordinance No. 100*, approved June 24th, 1886, *the total cost of the grading*, paving and kerbing of the said portion of North avenue, with interest thereon from the time the same was paid for by the Mayor and City Council of Baltimore to the day the City Commissioner makes such apportionment, *less the amount which has been paid by the the holders of the pieces of property binding on the said portion of North avenue, who paid the assessment levied under Ordinance No. 100, approved June 24th, 1886.*"

Under this ordinane, the plaintiff in error was assessed by the City Commissioner $4,634.27 (Record, p. 9), the identical sum assessed against her under the void Ordinance No. 100, with interest from January 22, 1889; and the City Collector being about to distrain upon and sell her property, she filed her bill of complaint in the Circuit Court of Baltimore City, alleging the aforegoing matters and praying for a decree declaring the Act of Assembly in contravention of the 14th amendment of the Constitution of the United States, and the Act and assessment, therefore, null and void, and for a perpetual injunction against the defendants in error, restraining the collection of the said assessment. (Record, pp. 4 to 14.)

In paragraph 7 of her bill of complaint, (Record, p. 9), she alleged:

"That the City Commissioner for said city of Baltimore, claiming to act in pursuance of said Ordinance No. 84, made the following assessments against the following parties, on

account of the alleged costs of grading, paving and kerbing North avenue, between Pennsylvania avenue and the western city limits, aforesaid, to wit:

[Here follows a list of the owners (including plaintiff in error), assessed, with the amounts of the several assessments. Record, pp. 9 and 10.]

"The aforegoing being an exact duplicate of the original list of the property and of the owners, or reputed owners thereof, claimed to be liable to pay the assessments under Ordinance No. 84, and the amount to be paid by each piece of property, on file in the office of said City Commissioner—the said parties being the owners of only a portion of the property binding on said North avenue, between Pennsylvania avenue and the western city limits, graded, paved and kerbed and benefited thereby, and the land so assessed being only a portion of said property."

And the defendants in error, by paragraph II of their answer to said bill of complaint, (Record, page 16,) admit:

"That this list contained all the property binding on said portion of North avenue which had not paid the tax levied and assessed under Ordinance 100, approved June 24, 1886, and none of the property binding on said portion of North avenue which had paid said tax. It is admitted that the property so excepted from said assessment and from said list, was paved, kerbed and graded, under said Ordinance 100, and was benefited thereby."

The answer further admits all the other allegations of the bill hereinbefore mentioned. (Record, pages 15, 16 and 17.)

A *pro forma* decree was passed in favor of the plaintiff in error, which was reversed by the Court of Appeals of Maryland, whereupon, the plaintiff in error sued out this writ, assigning the following as error (Record, page 28):

ASSIGNMENT OF ERRORS.

1st. That in the hearing and decision of the said cause, in the Court of Appeals of Maryland, at the April term thereof, 1894, there was drawn in question the validity of a statute of the State of Maryland, to wit, a portion of the Act of 1892, chapter 284, of the General Assembly of that State, on the ground of its being repugnant to the Fourteenth Amendment of the Constitution of the United States, and the said Court of Appeals decided in favor of the validity of said statute, and in so doing, erred.

2d. That in said cause in the Court of Appeals of Maryland, the said plaintiff in error claimed that the said Act of 1892, chapter 284, gave no hearing to the parties concerned, as to the aggregate sum to be collected thereunder, and that it was, therefore, in contravention of the Fourteenth Amendment to the Constitution of the United States, but the said Court held the said Act to be valid, and in so doing, erred.

3d. That in said cause in the Court of Appeals of Maryland, the said plaintiff in error claimed that the only hearing given by said Act of 1892, chapter 284, related to the apportionment of the unpaid balance amongst those who had not paid the original assessment. That the question of the original apportionment between their lands and the lands of those who had not paid, was not left open. That that act, therefore, deprived the owners who had not paid the original assessment, of the opportunity of being heard upon the question whether the apportionment as between them and the other land owners binding on North avenue, was equitable and fair, and was, therefore, in violation of the said Fourteenth Amendment of the Constitution of the United States, but the Court of Appeals of Maryland held said Act to be valid, and in so doing, erred.

4th. That the said plaintiff in error claimed in said Court of Appeals that the assessment against her, mentioned in the record, having been made under said uncon-

stitutional Act of 1892, chapter 284, the collection thereof by the defendants in error ought to be restrained, but the Court held otherwise, and passed a decree dismissing the bill of complaint of the plaintiff in error praying for such restraining order, and in so doing, erred.

At the October Term, 1894, a motion to dismiss or affirm was made by the defendants in error, which was submitted on December 17th, 1894, and on the 7th of January, 1895, was, by this Court, postponed until the case should be reached on its merits.

Points and Argument.

The plaintiff in error claims that the Act of Assembly of 1892, chapter 284, is in contravention of the 14th amendment of the Federal Constitution, and void, because:

No hearing is given by said Act of Assembly as to the aggregate sum to be collected. It is an attempt to validate void assessments without giving the owners of the land assessed an opportunity to be heard upon the whole amount of the assessment.

The only hearing given by that Act, relates to the apportionment of the unpaid balance amongst those who had not paid the original assessment under Ordinance No. 100 of 1886.

The question of the original apportionment between these lands and the lands of those who had not paid, is not left open. That Act therefore deprived the owners, who had not paid the original assessment, of the opportunity of being heard upon the question, whether the apportionment as between them and the other land owners binding on North avenue was equitable and fair, and was, therefore, in violation of the 14th Amendment.

This Court "is bound to accept the conclusion of the State Courts as to the proper construction of the Statute of the State."

Baltimore Traction Co. vs. The Balto. Belt R. R., 151 U. S. 137.

The Court of Appeals of Maryland, in considering chapter 219 of the Laws of 1892, (opinion, Record, page 26, lines 13, 14 and 15) says:

"It is perfectly apparent that this legislation only applied to ordinances for such grading or other authorized work as was to be *done after the passage of the Act.*"

The Act of 1874, chapter 218, having been repealed by chapter 219 of 1892, and the re-enactment applying, as the Court of Appeals says, only "to ordinances for such grading or other authorized work as was to be done after the passage of this Act"—there is of course no authority for Ordinance No. 84, either under chapter 218 of 1874, or under chapter 219 of 1892.

The Court of Appeals of Maryland, in construing chapter 284 of the Act of 1892, above set forth, held further:

1st. "*The requirements of the Act are to take the total assessment formerly made for improvements, then deduct the amount paid and assess the balance on the properties within the definite limits, to the extent that they have been, respectively, specially benefited by the improvements.*" (Record, bottom of page 23.)

2d. That the Act only applied to cases where invalid assessments had been made. (Record, middle of page 26.)

Chapter 284 *of the Acts of Assembly of Maryland of* 1892 *therefore,* as settled by the Court of Appeals of Maryland, *provides, that the City Commissioner of Baltimore shall take the total assessment under Ordinance No.* 100 *of* 1886, (notwithstanding the fact that that ordinance and the assessment thereunder, were, in 72 Md. 587, decreed to be unconstitutional and void), *deduct the amount paid by the property owners on account of the assessments under that void ordinance, and assess the balance on the other property holders.*

No assessment of the entire cost of the paving, grading and kerbing against all the property is provided for—the

ordinance arbitrarily assuming that the amount assessed against the property under Ordinance 100 of 1886, of those owners who paid the void assessments, under that unconstitutional ordinance, was correct. But as the Court of Appeals of Maryland held that assessment to be void, there never has been an assessment against those owners. Chapter 284 limits the assessments to the property upon which no payments under Ordinance No. 100 have been made; and the other property binding on North avenue, between Pennsylvania avenue and the western city limits, graded, paved and kerbed, and benefited thereby, is entirely excluded from further contribution to the cost of the work, irrespective of whether the amount heretofore paid is their full share of said cost or not.

The fact that the Act of Assembly provides that the tax shall be levied "to the extent that such property shall have been specially benefited by such improvement," does not remove the objection. Each owner of a lot can be held liable only for his *fair proportion* (according to the lot's value) of the *entire cost*, (in those cases where the *entire* cost is to be collected from the property specially benefited,) although that proportion be less than the amount of the benefit to his lot. The plan of assessing under chapter 284, may or may not secure that result. For instance, if the assessment under the void Ordinance No. 100, of 1886, (*which was by the "front foot rule,"*) against the owners of one-third of the property binding on that part of North avenue paved, graded and kerbed, who had paid their assessments, was one-third of the entire cost, and their proportion of the cost, based on the benefits to, or the value of, all the property, would be one-half, it is clear that imposing the two-thirds on the owners who have not paid, would be unjust. The benefit to all the property might be two or three times the cost of the improvements, so that merely to say that the tax against any piece of property shall be to the extent of the special

benefit, would not be just, when by observing that limit the property might be assessed to the extent of three times its proper share of the cost. But as the Act provides also for cases in which only a portion of the costs of the work is to be imposed upon the property, the injustice of such a mode of procedure is still more apparent. Such an assessment is erroneous, and violates the fundamental principle of equity, upon which only can taxation in any form be justified.

In re Petition of N. Y. Prot. Epis. Pub. School, 75 N. Y. 326.

In the case of Spencer vs. Merchant, 125 U. S. 359, 360, so much relied on by the Court of Appeals of Maryland, and by the defendant in error, Mr. Justice Matthews, with whom concurred Mr. Justice Harlan, dissenting, said:

"*This apportionment is only to be made as between the lands, in respect to which the prior assessment had been cancelled as being void. The question of the original apportionment between those lands and the remaining lands, on which the owners had paid the first assessment, was not left open under the Act of* 1881. *By this Act, therefore, the owners of the lands in question were deprived of the opportunity of being heard upon the question whether the apportionment as between them and the other land owners, embraced within the original assessment district for the same improvement, was equitable and fair. They were, therefore, deprived by the Act of* 1881 *of the very thing of which they were deprived by the Act of* 1869, *on account of which the Court of Appeals of New York held the latter Act to be unconstitutional and void.*"

Had the facts in that case been the same as in the present one, (i. e. had the Legislature not made the assessment itself,) the dissenting opinion would, I take it, have been the opinion of the Court. The only reason, as I understand this Court, for sustaining, in Spencer vs. Merchant, the constitutionality of the New York Act of

1881, was that the Legislature of New York had the *right* to determine, as it *did*, absolutely and conclusively the amount of tax to be raised for the paving of Atlantic avenue in the town of New Lots, and the property to be assessed, and upon which it was to be apportioned.

125 U. S. 352, 355.

In the present case, however, the Legislature of Maryland determined none of these things. The Act of 1892, chapter 284, was a general Act, applicable to "all streets, lanes and alleys or parts thereof," where the original paving assessments were void. It authorized the Mayor and City Council to provide by ordinance for the collection of the cost, and the ordinance passed, committed the matter to the City Commissioner. The cost of, or the assessment for, the paving of North avenue, was not before the Maryland Legislature, and, as a matter of course, it did not ascertain the tax to be raised out of the property which had not paid the assessment under the ordinance of 1886, nor the property to be assessed.

The Court of Appeals of New York, in its opinion in Spencer vs. Merchant, quoted by this Court with approval, (125 U. S. pages 353, 354) says:

"The *Legislature* may commit the ascertainment of the sum to be raised and of the benefited district, to commissioners, but it is not bound to do so, and may settle both questions for itself, *and when it does so, its action is necessarily conclusive and beyond review.*" "By the Act of 1881 the *Legislature* imposes the unpaid portion of the costs and expense, with the interest thereon, upon that portion of the property benefited, which has thus far borne none of the burden. In so doing, it necessarily determines too things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvements, and so the *legislative* determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review.

The question of special benefit, and the property to which it extends, is of necessity a question of fact, and when the *Legislature* determines it in a case within its general power, its decision must of course be final * * *. The *Legislature* practically determined that the lands described in that Act were peculiarly benefited by the improvement to a certain specified amount, which constituted a *just proportion of the whole cost and expense.*" "These views (page 354), furnish also an answer to the objection, that the only hearing given to the land owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the *Legislature*, or be of any avail to review or change it. * * *. The precise wrong of which complaint is made appears to be that the land owners now assessed never had opportunity to be heard as to the original apportionment, and *find themselves now practically bound by it as between their lots and those of the owners who paid.* But that objection becomes a criticism upon the action of the *Legislature* and the process by which it determines the amount to be raised and the property to be assessed."

This Court, then, in its own opinion (pages 355, 356, 357), says:

"The *Legislature*, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of *legislative* discretion." "But the *Legislature* has the power to determine by the statute imposing the tax, what lands which might be benefited by the improvement, are in fact benefited; and if it does so, *its determination is conclusive upon the owners and the Courts*, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the *class which the Legislature has conclusively determined to be benefited.*"

By the Statute of 1881 the *Legislature*—

"Determined that the lots upon which no part of *that* assessment had been paid, and which had, therefore, as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. *That these lots as a whole had been benefited to this extent was conclusively settled by the Legislature.*"

The effect of the New York Act of 1881, was, therefore, to make that portion of Atlantic avenue in the town of New Lots, which had paid no portion of the cost of paving, &c., a separate and distinct taxing district—precisely as if the portion of the avenue upon which the assessments had been paid had never been in fact paved, and the amount levied upon the former had been the actual cost of paving, &c., that portion of the avenue. In other words, as if the paving of the one had never in anywise been connected with the paving of the other. The Legislature had, upon such evidence as was satisfactory to it, determined that all the lands within the district, defined in the law of 1869, had been benefited to the extent of the original assessment, and that the fair and equitable portion of the whole cost payable by those lots was the amount unpaid. This having been done by the *Legislature*, was conclusive—not to be reviewed by the Courts.

In the Ulman Case, as before stated, the Legislature determined none of these things. They did not have the North Avenue Case before them. The Act of 1892, chap. 284, was a general one. It authorized *the Mayor and City Council* to provide for the collection of unpaid assessments under any void assessments—the North Avenue paving, &c., was not mentioned in any way.

How is it possible to hold that the Legislature, in thus passing this act, made a separate taxing district of those portions of North avenue that had not paid the tax? How can it be held that it determined that the parties that had not paid, had been benefited to the extent of

the unpaid assessments? The Legislature determined nothing in these particulars, and the Spencer vs. Merchant Case is not, therefore, an authority for the opinion of the Court of Appeals of Maryland in the present case, nor for the contention of the defendants in error in this Court; on the contrary, the Spencer-Merchant case distinctly draws the distinction between a case where, as in that, the Legislature specifically determines the lands benefited, and the amount they are to be assessed, for the improvement of a particular street, and a case where the authority is delegated. On page 357, this Court says:

"In section 4 of the Statute of 1869, *the assessment* under which *was held void* in Steuart vs. Palmer, 74 N. Y. 183, for want of any provision whatever, for notice or hearing, *the authority to determine what lands*, lying within three hundred feet on either side of the street, *were actually benefited, was delegated to Commissioners.* But, in the Statute of 1881, *the Legislature, itself, determined* what lands were benefited and should be assessed."

The Spencer-Merchant Case admits of no other construction than that when the Legislature does not determine the taxing district, and the amount of the costs, but leave the levy and collection for any street paving, &c., to a municipality or to one of its officers, that the parties interested have a right to be heard upon the whole cost and the equitable apportionment of the *whole* cost amongst all the parties benefited, and that any Act that authorizes the parties to whom the power is delegated, of levying the cost arbitrarily, is necessarily in conflict with the 14th amendment, and is void.

The law must operate alike on all persons and property similarly situated.

Wurts vs. Hoagland, 114 U. S. 606.

In Wurts vs. Hoagland, 114 U. S. 606, this Court sustained the validity of the Act, because "the Statute is

applicable to all lands of the same kind," (page 615.) The hearing was as to all the lands benefited, and an opportunity was given to ascertain whether the amount assessed against each owner was his fair and equitable proportion of the *whole cost.*

In order not to be in conflict with the 14th Amendment, laws must, says this Court, in Barbier vs. Connolly, 113 U. S. 32:

"Operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation, *it affects alike all persons similarly situated, is not within the amendment.*"

An opportunity to be heard in the apportionment of the entire tax must be given. It is no hearing within the meaning of the law, when the original assessment having been held to be null and void, the Legislature arbitrarily enacts a law that the assessment under *any* void ordinance, if paid, shall be conclusively considered the whole amount due by such owners, and that the balance unpaid shall be assessed against the balance of the property, and that the hearing shall only be as to the apportionment of the balance as between the lots that have not paid. There is no chance for any owner of testing whether the amount assessed against his piece of property is its fair proportion of the whole cost. All the Act gives him a right to do, is to ascertain whether the amount assessed against him is a fair proportion of the balance due as between his lot and the other lots that have not paid.

If a law be "found to be arbitrary, oppressive and unjust it may be declared to be not due process of law."

Davidson vs. New Orleans, 96 U. S. 107.

The plaintiff in error respectfully submits, that for the reasons above given, the decree of the Court of Appeals of Maryland should be reversed.

M. R. WALTER,

Counsel for Plaintiff in Error.

APPENDIX.

ACT OF 1892, CHAPTER 219.

An Act to repeal section 810 of article 4 of the Public Local Laws, title "City of Baltimore," sub-title "Streets, Bridges and Highways," and to re-enact the same with amendments.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That section 810 of article 4 of the Public Local Laws, title "City of Baltimore," sub-title "Streets, Bridges and Highways," be and the same is hereby repealed and re-enacted, so as to read as follows:

SEC. 810. They shall have and are vested with full power and authority to provide by ordinance for the grading, shelling, graveling, paving and kerbing, or for the regrading, reshelling, regraveling, repaving and rekerbing, of any street, lane or alley in said city, or part thereof now condemned, ceded, opened, as a public highway, or which may hereafter be condemned, ceded, opened, widened, straightened or altered according to the laws and ordinances regulating the same; and also for assessing the cost of any such work in whole or in part upon the property binding upon such street, lane or alley, or part thereof according to such rule or basis as the mayor and city council may determine and for collecting said assessments in such manner as they may prescribe, either before or after the works shall have been done; provided that before the passage by either branch of the council of any ordinance requiring the whole or any portion of the cost to be assessed upon the property, ten days' notice shall be given in at least twe of the daily newspapers in said city and an opportunity shall be afforded to all persons interested therein to appear and be heard before some appropriate committee of the council, and they may also provide for appeals to

the Baltimore City Court from the decisions of any commissioner or other person or persons appointed to determine the amount of assessment to be made upon any property under any such ordinance and in the trial of such appeal, the practice shall conform as near as may be to the practice in the trials of street appeals, including the right of appeal to the Court of Appeals.

SEC. 2. *And be it enacted*, That this act shall take effect from the date of its passage.

Approved March 28th, 1892.

ACT OF 1892, CHAPTER 284.

An Act to authorize the mayor and city council of Baltimore to levy special assessments, and to provide for the collection thereof, upon property binding on any street, lane or alley of said city or part thereof, which may have been graded, paved or curbed, or regraded, repaved or recurbed under any ordinance or ordinances of the mayor and city council, which ordinance provided for assessing the whole or any portion of the cost of such work upon the property binding upon such street, lane or alley, or part thereof, and which assessments from any cause have not been fully collected by said mayor and city council.

WHEREAS, certain streets, lanes and alleys, or parts thereof in the city of Baltimore, have been graded, paved or curbed or regraded, repaved or recurbed under ordinances of the mayor and city council, which provided for the assessment of the whole or certain portions of the cost of such work upon the property binding on such streets, lanes or alleys, or parts thereof, so improved, some of which assessments, have been paid, and other portions thereof, remain uncollected, although the mayor and city council have paid the whole cost of such improvements.

AND WHEREAS, it is just and proper that all property which may have been benefited by such work should pay its proper proportion of such cost, to the extent that such property may have been specially benefited, therefore:

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That in any and all cases where any street, lane or alley, or any part thereof, in the city of Baltimore, has been graded, paved or curbed or regraded, repaved or recurbed under any ordinance which provided for assessing the whole or any portion of the cost of such improvement upon the property binding on such street, lane or alley, or part thereof, and such assessments, or any part thereof, remain unpaid, it shall be lawful for the mayor and city council of Baltimore to provide by ordinance for the levy and collection in such manner as they may deem proper, of a tax upon all the property binding on any street, lane or alley, or part thereof which may have been so improved, to the extent that such property shall have been specially benefited by such improvement; provided that no property upon which the assessment originally made for its share of the cost of such improvement shall have been paid, shall be again assessed, and that reasonable notice and an opportunity to be heard shall be given to all persons interested before the final ascertainment of the amount of tax to be paid by any such property; and the said mayor and city council shall provide for appeals to the Baltimore City Court by any person or persons interested, including the mayor and city council themselves from the decision of any commissioner or commissioners or other persons appointed to determine the amount or amounts of such special taxes or assessments; and in the trial of such appeals the practice shall conform as near as may be to the practice in the trial of street appeals, including the right of appeal to the Court of Appeals.

SEC. 2. *And be it enacted*, That this act shall take effect from the date of its passage.

Approved April 1st, 1892.

Ordinance No. 84, Approved April 20, 1893.

An Ordinance to provide for the levying of a tax upon property binding on North avenue, between Pennsylvania avenue and the western city limits, which did not pay the assessment assessed under Ordinance No. 100, approved June 24th, 1886.

Whereas, By an ordinance, No. 100, approved June 24th, 1886, entitled "An ordinance to provide for grading, paving and kerbing North avenue, between Pennsylvania avenue and the western city limits, provision was made that all that part of North avenue, between Pennsylvania avenue and the western city limits, should be graded, paved and kerbed, and that the expense thereof should be assessed upon the owners of property binding on said avenue in proportion to the number of front feet owned by them respectively of the said portion of the said avenue hereby directed to be paved, in accordance with Section 34 of Article 47 of the Baltimore City Code of 1879; and after the work had been done by the City Commissioner, and some of the property holders had paid the amount assessed against them, the Court of Appeals of Maryland, in a suit instituted to resist the collection of the said assessment, declared the said assessment to be null and void, and therefore a large portion of the cost of such grading, paving and kerbing of North avenue, between Pennsylvania avenue and the western city limits, has never been paid to the Mayor and City Council of Baltimore; and

Whereas, By Chapter 219 of the Acts of 1892, full power and authority is given to the Mayor and City Council of Baltimore to provide by ordinance for the levy and collection, in such manner as they may deem proper, of a tax upon all property binding upon any street, lane or alley, or part thereof, which may have been so improved to the extent that such property shall have been specially benefited by such improvement; provided, that no property upon which the assessment originally made for its share of the cost of such improve-

ment shall have been paid, shall be again assessed, and that a reasonable notice and an opportunity to be heard shall be given to all persons interested, before the final ascertainment of the amount of tax to be paid by any such property; now, therefore,

SECTION 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That the City Commissioner be authorized and directed to give ten days' notice, in two of the daily newspapers published in the City of Baltimore, that on the day and at the time and place mentioned, he will ascertain and determine the amount of tax to be assessed upon all property binding on North avenue, between Pennsylvania avenue and the western city limits, and which did not pay the assessment levied upon it under Ordinance No. 100, approved June 24th, 1886, for the special benefits which have been derived by said property from the grading, paving and kerbing of said portion of North avenue, on the day and at the place named; after hearing all persons interested who may desire to be heard, he shall proceed to apportion among the different pieces of property binding on said portion of North avenue, and upon which there has not been paid the assessment levied under Ordinance No. 100, approved June 24th, 1886, the total cost of the grading, paving and kerbing of the said portion of North avenue, with interest thereon, from the time the same was paid for by the Mayor and City Council of Baltimore to the day the City Commissioner makes such apportionment, less the amount which has been paid by the holders of the pieces of property binding on the said portion of North avenue who paid the assessments levied under the said Ordinance No. 100, approved June 24th, 1886; provided, however, the tax assessed against any piece of property shall not be more than the amount which said property has been specially benefited by the grading, paving and kerbing of said portion of North avenue; and the City Commissioner

may adjourn from time to time, if necessary, to give all parties an opportunity to be heard, and after hearing the different parties interested, he shall make out a list of the property and of the owners or reputed owners thereof liable to pay the tax and the amount to be paid by each piece of property, and shall deliver to the City Register a duplicate list thereof, under his hand, together with such explanatory plat or plats, if any, as may be necessary to designate the property upon which said tax or assessment is levied, which taxes shall be liens upon the several pieces of property upon which the same shall respectively be assessed.

SEC. 2. And be it further enacted and ordained, That it shall be the duty of the City Register, within five days after the said proceedings shall have been deposited in his office, to notify all persons interested, by an advertisement to be inserted once a week for two successive weeks in two of the daily newspapers of the city, that the said assessment and explanatory plat or plats have been so placed in his office, and that the parties affected thereby are entitled to appeal therefrom by petition in writing to the Baltimore City Court.

SEC. 3. And be it further enacted and ordained, That it shall be the duty of the City Commissioner to serve written or printed notices on each and every party or parties assessed or taxed under this ordinance; provided, however, that the service of such notice shall not be so construed as to be one of the prerequisites to the collection of the said assessment or tax.

SEC. 4. And be it further enacted and ordained, That any person or persons, including the Mayor and City Council of Baltimore, who may be dissatisfied with any assessment in which he or they are in any manner interested, may, within thirty days after the return of the above mentioned list of the property and owners or reputed owners thereof, liable to said tax or assessment by the City Commissioner, to the City Register, appeal

therefrom by petition to the Baltimore City Court, praying said Court to review the same, and thereupon the proceedings shall be similar to those in the case of the trial of street appeals, and the same right shall be had to appeal to the Court of Appeals.

SEC. 5. And be it further enacted and ordained, That if no appeal shall have been prayed, then within ten days after the time hereinbefore limited therefor, or after the return of the final decision upon any such appeal or appeals shall have been made to the Register, the said Register shall transfer the said list received from the City Commissioner to the City Collector, who shall thereupon proceed in all respects as he does in cases where persons or property are assessed for benefits for opening, closing, widening and straightening any street lane or alley.

SEC. 6. And be it further enacted and ordained, That this ordinance shall take effect from the date of its pas sage.

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CLERK.

165-719

IN THE

Supreme Court of the United States

No. 174. OCTOBER TERM, 1896.

In Error to the Court of Appeals of Maryland.

CLEMENTINE ULMAN,

By her Husband and Next Friend ALFRED J. ULMAN,

Plaintiff in Error.

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,

AND

LEWIS N. HOPKINS, CITY COLLECTOR,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

THOMAS G. HAYES,
City Counselor,
Counsel for Defendants in Error.

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BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error is Clementine Ulman, wife of Alfred J. Ulman, and the defendants in error are the municipality of the city of Baltimore, State of Maryland, and Lewis N. Hopkins, City Collector of taxes for said city. The suit was brought by the plaintiff in error to prevent for the second time the collection of the assessment levied on her property on North avenue to pay her portion, in proportion to the benefits she has received, of the cost and expenses of grading, paving

and kerbing said avenue by the city of Baltimore. The writ of error is to the Court of Appeals of Maryland to review its decision dismissing the bill of complaint of the plaintiff in error, and requiring her to pay the assessment in question, and holding the Act of 1892, chapter 284, and ordinance passed under it, valid. The facts of the case are as follows:

The plaintiff in error and other owners of lots binding on North avenue, between Pennsylvania Avenue and the western city limits, in the City of Baltimore, succeeded on the 13th day of March, 1893, in escaping from the payment of certain assessments which had been levied upon their respective lots, binding on North avenue, to the extent to which said lots had been benefited by the grading, paving and kerbing of North avenue within the above limits. The grounds upon which they escaped the payment of these assessments were that the Act of the Legislature of Maryland of 1874, chapter 218, and the Ordinance of the Mayor and City Council of Baltimore, passed thereunder, and known as No. 100, (Record, 4) under which said grading, paving and kerbing were done, and the original assessments levied, under the same, were declared by the Court of Appeals of Maryland to be void, because neither the Act or Ordinance provided for a notice to and an opportunity to be heard by the owners of the different lots, before the amounts of their respective assessments were ascertained and fixed.

In thus deciding, the Court of Appeals followed the opinion of this Court in *Spencer vs. Merchant*, 125 U. S. 359, and held Ordinance No. 100 void for the reasons above given, and enjoined the defendants in error from collecting the assessments levied against the lots of the plaintiff in error. The opinion of the Court of Appeals on this appeal is reported in 72 Md. 587.

Afterwards, to meet the views of the Court of Appeals as expressed in this opinion, the Legislature of Maryland passed the Act of 1892, chapter 284, and the Mayor

and City Council of Baltimore, under the power conferred by said Act, passed Ordinance No. 84, (Record, 7.) It will be seen by an inspection of the Act and Ordinance in question, that the draughtsman of both, closely and carefully followed the law as laid down by this Court in *Spencer vs. Merchant, supra.* The City of Baltimore subsequently, under and in strict conformity with both the said Act and Ordinance, and after due notice and an opportunity to the plaintiff in error to be heard in a judicial proceeding, assessed her property binding on North avenue, for the benefits received by such property from the grading, paving and kerbing of North avenue; and upon the City's attempting to collect the assessment, the plaintiff in error filed her bill in the Circuit Court of Baltimore City, and sought to restrain by injunction the defendants in error from collecting the same, and upon appeal the Court of Appeals of Maryland, upon the authority of *Spencer vs. Merchant, supra*, reversed the *pro forma* decree of the Court below, and held both the Act and Ordinance valid, and dismissed her bill. This opinion of the Court of Appeals is reported as *Mayor and City Council of Baltimore vs. Ulman*, 79 Md. 469, and is also found in Record, page 21.

It is to be noted that the plaintiff in error did not avail herself of the provisions of the Act and Ordinance in question and contest the validity of either, or the assessment on her property before the Courts of the State of Maryland, provided for in both the Act and Ordinance, but remained passive, without a step taken by her to resist the assessment or test the validity of the Act and Ordinance in the manner provided for in both until after the assessment and levy had been made, and when the City Collector was about proceeding to enforce the payment of the assessment, she then, not in a direct but in a collateral proceeding by a bill in equity, attempted to restrain the defendants in error from collecting the assessment, and based her

claim as to the invalidity of the Act upon the two grounds set forth in her second and third assignment of errors and which in her brief on page 7, are stated as follows: First, that "*no hearing is given by said Act of Assembly as to the aggregate sum to be collected,*" and, secondly, that "*the only hearing given by that Act relates to the apportionment of the unpaid balance amongst those who had not paid the original assessment,*" both of which grounds could have been considered and passed upon by the State Courts under the provisions of the Act and Ordinance in question before the assessment was levied upon her property.

ARGUMENT.

The defendants in error will contend that neither of the grounds set out in the second and third assignment of errors, which are the only errors relied on in the brief of plaintiff in error as the errors of the State Court, is a valid reason for any Court, but especially a Federal Court, to hold the Act and Ordinance in question invalid. Both of these objections were made in the New York case, and held by this Court in *Spencer vs. Merchant, supra,* to be without merit. The fact that the Legislature of Maryland delegated to the City Commissioner the power to ascertain and assess on the lot of plaintiff in error a certain proportion of an amount fixed by the Leigislature, after notice and an opportunity to be heard in a judicial proceeding, as part of the cost of said improvement to the extent of the benefit said improvement was to the lot of the plaintiff in error, was lawful, and does not take the case out of the rule as laid down in *Spencer vs. Merchant, supra.*

I.

The Construction of the Act of 1892, Chapter 284, by the Court of Appeals of Maryland.

The Legislature of Maryland, by this Act, provided a general system applicable to all similar cases of

assessing and collecting by the city, from the owners of property benefited by local improvements who had not paid the original assessments, after notice and an opportunity to the owners to be heard in a judicial proceeding, a portion of the total cost of the local improvement in question, "to the extent that such property shall have been specially benefited."

The Act of 1892, chapter 284, as construed by the Court of Appeals, determines:

1. The taxing district. 2. The aggregate sum to be collected from the taxing district. 3. That all the lots in the taxing district were benefited by the local improvement. This was unquestionably within the power of the Legislature, and is not reviewable by the Courts. Then the Act leaves to be determined, after proper notice and hearing, the apportionment of the aggregate amount thus fixed by the Legislature on all the lots in the district to the extent of the benefit each lot has received by reason of the local improvement.

Judge Boyd, in construing the Act, said:

> "The Act of 1892, chapter 284, authorized the appellant 'to provide by ordinance for the levy and collection, in such manner as they may deem proper, of a tax upon all the property binding on any street, lane or alley or part thereof, which may have been so improved, to the extent that such property shall have been specially benefited by such improvement; provided, that no property upon which the assessment originally made for its share of the cost of such improvement shall have been paid, shall be again assessed.' The requirements of the Act are to take the total assessment formerly made for improvements, then deduct the amount paid, and assess the balance on the properties within the defined limits, to the extent they have been respectively specially benefited by the improvement.
>
> "*That was as certain as if the Legislature had named a definite sum to be assessed on those who had not paid, on North avenue or any other street where a similar condition of things existed. The objection of the appellee that no hearing is given by the Statute as*

to the aggregate sum to be collected was raised, and distinctly answered in Spencer's case, on page 588. The Act of 1892 further provides—'that reasonable notice and an opportunity to be heard shall be given to all persons interested, before the final ascertainment of the amount of tax to be paid by any such property.' It required appellant to provide for appeals to the Baltimore City Court from the decision of any commissioner or other person appointed to determine the amount or amounts of such special taxes or assessments, and also for the right of appeal to this Court. The ordinance, as shown above, provided for ample notice. Ulman's case, on page 611, authorizes notice by summons or through the newspapers.

"*Thus we see that the appellee had ample opportunity to have a jury pass upon the assessment against her property, as well as to have the Court below, and this Court, on appeal, determine the legality of the proceedings* INCLUDING THE VALIDITY OF THE STATUTE AND ORDINANCE. We are of the opinion that *Spencer vs. Merchant* and the former case between these parties fully sustain the validity of the Statute and also of the Ordinance."

Baltimore vs. Ulman, 79 Md., 469, 480.
See also Record, page 21.

The construction thus given the Act of 1892, chapter 284, by the Court of Appeals of Maryland, is clearly right, but if it were not, this Court is bound to accept it as the proper construction.

Balto. Traction Co. vs. Balto. Belt R. R., 151 U. S., 137.
Fallenbrook Irrigation District vs. Bradly, 164 U. S., 112.

This Court has repeatedly held that a State Statute which contained the provisions of the Act of 1892, chapter 284, providing for notice and a judicial hearing, before the assessment is ascertained and levied, is free from any objection available in a Federal Court, however obnoxious it may be to other objections and violative of the principle of equal taxation. In the case of *Davidson*

vs. New Orleans, 96 U. S., 97, Mr. *Justice Miller*, speaking for the Court, said:

> "That whenever, by the laws of a State or by *State authority*, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary Courts of Justice with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. It may violate some provision of the State Constitution against *unequal taxation*, but the Federal Constitution imposes no restraints on the State in that regard."

In the same case in another portion of Mr. *Justice Miller's* opinion the limitations on the power of this Court, in reviewing the provisions of a State Statute relating to assessments for local improvements, are thus stated:

> "It is not possible to hold that where, by the laws of the State, the party aggrieved has, as regards the issues affecting his property, a fair trial in a Court of Justice, according to the modes of proceeding applicable to such case, that he has been deprived of that property without due process of law. This was clearly stated by this Court, speaking by the *Chief Justice*, in the case of *Kennard vs. Morgan*, 92 U. S., 480, and repeated in substance in the case of *McMillan vs. Anderson*, at the present term." (95 U. S., 37.)

Mr. *Justice Field*, in another case, speaking for this Court, states the same rule of law, in brief but expressive and forcible language. He says:

> "This Court is not the harbor in which people of a city or county can find refuge from *ill advised, unequal and oppressive State legislation.*"
> *Mobile vs. Kimball*, 102 U. S. 691.

If then it were conceded that inasmuch as the Act of 1892, chapter 284, gave "no hearing as to the aggregate sum to be collected," and only a hearing as "to the apportionment of the unpaid balance amongst those who had not paid the original assessment," and hence, that the Act in question imposed on the plaintiff in error, "ill advised, unequal and oppressive State legislation," yet this tribunal would not be the place to obtain redress for these grievances, but rather the Courts of the State, provided for by the Act and Ordinance in question, where, as we have seen, *Judge Boyd* said, speaking for the Court of Appeals of Maryland:

> "That appellee had ample opportunity to have a jury pass upon the assessment against her property, as well as to have the Court below, and this Court, on appeal, determine the legality of the proceedings, *including the validity of the Statute and Ordinance.*"
> *Baltimore vs. Ulman*, 79 Md. 469, 480.
> See also, Record, page 24.

The plaintiff in error refused the opportunity offered her by the Act and Ordinance in question, to test in the proper tribunal, "the validity of the Statute and Ordinance." She waited in silence, and without an objection to the proceedings, until after the assessment was levied, and the defendants in error attempted to make her contribute her just proportion of the cost of the improvement, which it is not denied had benefited her property, and then she collaterally assailed the Act and Ordinance by a bill in equity, and from a decree of the highest Court of the State of Maryland declaring the Act and Ordinance valid, and that it was her duty to pay the assessment, she seeks to have this Court, in the teeth of its often repeated decisions, hear and decide her complaint, upon the ground that the failure to give her a hearing on "the aggregate sum to be collected," as well as the failure to give her a hearing as to "the apportionment of said sum among all the owners" on

North avenue benefited by the improvement, was not due process of law and violated the Federal Constitution.

Applying the rule of law as announced by this Court in the above cases, as to its power to review the provisions of State Statutes which provide for the assessment of the property of owners according to the benefits received from a local improvement, after notice and an opportunity to be heard in a judicial proceeding, to the Act of 1892, chapter 284, as construed by the Court of Appeals of Maryland, it is respectfully submitted that the plaintiff in error has no standing in this Court on the writ of error sued out in this case.

In concluding this division of the brief, the pertinent enquiry of this Court, by Mr. *Justice Brewer*, asked in *Paulsen vs. Portland*, 149 U. S. 41, may be quoted:

> "And can this Court say, when these proceedings have been sustained by the Supreme Court of the State, that rights guaranteed by the Federal Constitution have been stricken down, and those individuals have been deprived of their property without due process of law."

II.

Hearings either on the aggregate sum to be collected, or the apportionment of the unpaid balance amongst those who had, as well as those who had not, paid the original assessment are not legal rights belonging to the plaintiff in error, and if they were, this Court has no jurisdiction to enforce them as the aggregate sum to be collected or the apportionment of the tax, however unequal, where benefit has been legally found and the proper notice and hearing afforded, do not involve Federal questions.

It has been endeavored to be shown under the preceding head of this brief that the Act of 1892, chapter 284,

as construed by the Court of Appeals of Maryland, gave to the plaintiff in error in a judicial proceeding in the State Courts, after notice, a right to assail the Act and Ordinance in question, because no hearings were provided either as to the aggregate sum to be collected or the apportionment of the unpaid balance amongst those who had, as well as those who had not, paid the original assessment. *Judge Boyd*, speaking for the Court of Appeals, has, as we have seen, said that the plaintiff in error could "have the Court below, and this Court on Appeal determine the legality of the proceedings, including the validity of the Statute and Ordinance."

It is submitted that the plaintiff in error could not have successfully assailed the Act and Ordinance on either of these grounds, even in the State Courts, as it was clearly within the power of the Legislature to require her to pay for the benefits she had received by the local improvement in question, without giving her a hearing as to either of these questions, of which she claims to have been deprived; but whether this is so or not, it was her right and privilege under the Act of 1892, chapter 284, to have presented these questions in the Courts of the State, as provided in the Act in question, before the ascertainment and levy of the assessment on her property; and this she did not do, having persistently refused so to do.

Under this division of the brief it is desired to present the views of the defendants in error as to the question whether these hearings of which the plaintiff in error claims she was deprived under the Act and Ordinance in question, can possibly be made to present a Federal question which this Court has jurisdiction to hear and decide. The defendants in error with confidence contend that these assignments of error do not present a question in which any right of the plaintiff in error is involved with which the Constitution, laws or treaties of the United

States are concerned, or which this Court is empowered to enforce.

This Court, in *Spencer vs. Merchant, supra*, has unequivocally declared that these hearings of which the plaintiff in error claims she was deprived, and of which she now complains, were not hearings to which she was entitled; and, further, if they were, her deprivation did not invalidate the Act or involve a Federal question; but before referring more in detail to this case, it is desired to present some decisions of this Court given before *Spencer vs. Merchant*, which fully support the contention of the defendants in error.

In *Davidson vs. New Orleans*, 96 U. S. 104, this Court, through Mr. *Justice Miller*, in referring to the assessment in that case, and the objections made to the Statute under which the assessment had been made, as not presenting a federal question, propounds this pertinent inquiry:

> "Can it be necessary to say that if the work was one which the State had authority to do, and to pay for it by assessments on the property interested, that on such questions of method and detail as these, the exercise of the power is not regulated or controlled by the Constitution of the United States?"

The questions which were referred to by Mr. *Justice Miller* in the above extract from his opinion, were the provisions of the Statute under review, by which a private corporation had been organized to do the work, and the price at which the work was to be done was fixed by the Act, and which was charged to be *exorbitant*, and that under the assessment a surplus would be collected from the property taxed, not needed for the work on the local improvement and which would go into the City Treasury for general use, as public funds.

In *Mobile County vs. Kimball*, 102 U. S. 691, Mr. *Justice Field*, in his opinion, said:

> "When any public work is authorized, it rests with the Legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular sub-divisions of the State, or lay the greater share, or the whole, upon that county or portion of the State specially or immediately benefited by the expenditure. It may be that the Act imposing upon the County of Mobile the entire burden of improving the river, bay and harbor of Mobile, is *harsh and oppressive*, and that it would have been more just to the people of the county if the Legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all the counties. But this Court is not the harbor in which the people of a city or county can find a refuge from *ill advised, unequal and oppressive* State legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution, laws or treaties of the United States is involved."

In *Hagar vs. Reclamation District*, 111 U. S., 701, this Court, in referring to assessments for local improvements by Mr. *Justice Field*, said:

> "The expense of such works may be charged against parties specially benefited. All that is required in such cases is that the charge shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that to some extent inequalities may arise."

In *United States vs. Memphis*, 97 U. S., 284, the right and power of a Legislature of a State to decide what districts shall be liable for taxation for local uses, was declared to be the law. This Court, in that case, said by Mr. *Justice Strong:*

> "Surely the Legislature is not prohibited from declaring what districts shall be liable to taxation for local uses."

Testing the Act of 1892, chapter 284, by the principles announced in the above cases, it is respectfully submitted that there can be found nothing in its provisions which even remotely can be said to impair any right of the plaintiff in error which is protected by the Constitution, laws or treaties of the United States.

The failure of the Act to provide for the hearings of which the plaintiff in error complains, may be conceded for the sake of the argument to be "harsh and oppressive" in the results upon the plaintiff in error; the Act may in its operation produce "inequalities" in the share to be paid by the plaintiff in error; such legislation may be "ill advised, unequal and oppressive;" yet none of these things, say this Court in the above cases, can give rise to any question cognizable in this tribunal.

Passing now to the consideration of the case of *Spencer vs. Merchant*, *supra*, which was followed in draughting the Act and Ordinance in question, it will be found that the identical objections made in this case as to the Act of 1892, chapter 284, were made to the New York Act, and held by this Court to be without merit. As to the objections made in the New York case that the plaintiff in error in that case had no hearings either as to the aggregate sum to be collected, and only as to the apportionment of the unpaid balance amongst those who had not paid the original assessment, this Court adopting the opinion of *Judge Finch*, of the New York Court of Appeals, through Mr. *Justice Gray*, says:

> "Certainly, if the Acts of 1869 and 1870 had never been passed, but the improvement of Atlantic Avenue had been ordered, the Legislature might have imposed *one part or proportion of the cost upon one designated district and the balance upon another.* Practically just that was done in this case."

Mr. *Justice Gray*, further on in his opinion, and still quoting from the opinion of *Judge Finch*, says;

> "These views furnish also an answer to the objection that the only hearing given to the land owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as *to the aggregate to be collected.* No hearing would open the discretion of the Legislature, or be of any avail to review or change it. A hearing is given by the Act as to the apportionment among the land owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability or its amount and extent. The precise wrong of which complaint is made, appears to be, that the land owners now assessed *never had an opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid.* But that objection becomes a criticism upon the action of the Legislature and the process by which it determined the amount to be raised and the property to be assessed. *Unless by special permission, that is a hearing never granted in the process of taxation*"

Could there be a more complete answer to the assignments of error in this case, than the above language of Mr. *Justice Gray*, in the quotation above given? The hearings of which this plaintiff in error was deprived and complains, and for which deprivation she now assails the Act in question, this Court says, are "*never granted in the process of taxation.*"

Again, Mr. *Justice Gray*, quoting from *Judge Finch*, says:

> "The landowners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the landowner an opportunity to assail the constitutional validity of the Act under which alone an apportionment could be made, and that objection failing, it opened the only other possible questions of the mode and amount of the apportionment itself. We think the Act was constitutional."

Mr. *Justice Gray*, in his own language, just before concluding his opinion, repeats, in substance, the above quotations from *Judge Finch* and gives his full approval to the principle of law. He says:

> "The Statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them (those who had not paid the original assessment) of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the Statute; *and that was all the notice and hearing to which they were entitled.*"

It is respectfully submitted that the above case of *Spencer vs. Merchant*, fully and conclusively supports the decision of the Court of Appeals of Maryland, and the contention of the defendants in error as to the validity of the Act and Ordinance in question.

While this brief is passing through the press, the decision in *Fallbrook Irrigation District vs. Bradley*, 164 U. S., 112, is announced, where the principles of law decided in *Spencer vs. Merchant*, are fully approved and affirmed. The case demonstrates the correctness of the decision of the Court of Appeals of Maryland in the case at bar, as well as the fact that the alleged errors relied on by the plaintiff in error in this appeal are without merit. The defendants in error rely on the above case as clearly showing their right to an affirmance of the decree of the Court of Appeals of Maryland by this Court.

Mr. *Justice Peckham*, in the concluding portion of his opinion, expressly decides that where a benefit to all the land, accruing from the improvement, has been legally found, that the mode of the apportionment of the tax, however inequitable and unequal, does not violate the Federal Constitution. His language is as follows:

> "Where the fact of some benefit accruing to all the lands has been legally found. * * * It is one of

> those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land, with regard to the benefit it has received, which is open to the discretion of the State Legislature, *and with which this Court has nothing to do.* The way of arriving at the amount may be in some instances *inequitable and unequal*, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law."

In a preceding part of his opinion, in speaking of the jurisdiction of this Court, under the 14th amendment to Federal Constitution, he says:

> "It never was intended that the Court should, as the effect of the amendment, be transformed into a Court of Appeal, where all decisions of State Courts involving merely questions of *general justice and equitable considerations in the taking of property* should be submitted to this Court for determination."

Spencer vs. Merchant has itself been frequently quoted with approval by this Court—

Walton vs. Nevin, 128 U. S., 582.
Palmer vs. McMahon, 133 U. S., 669.
Lent vs. Tillson, 140 U. S., 328.
Budd vs. New York, 143 U. S., 546.
Paulsen vs. Portland, 149 U. S., 40.
W. & St. P. Land Co. vs. Minnesota, 159 U. S., 537.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

The plaintiff in error attempts to escape the force and effect of *Spencer vs. Merchant* by contending that the Legislature of Maryland in the Act of 1892, chapter 284, has not specifically levied a specific sum on a specific district, as was done in the New York Act, and endeavors to draw a distinction between the two cases. Under the next head of this brief this contention of the plaintiff in error will be considered.

III.

Reply to the argument of plaintiff in error as contained in her brief.

The points made in the brief of the plaintiff in error to sustain her two assignments of error relied on, and which are that no hearings were afforded her as to the question of the aggregate sum to be collected or as to the apportionment of the unpaid balance of the cost of the improvement among those who had and those who had not paid the original assessment, may be classified as follows:

1. The Act of 1892, chapter 284, and Ordinance in question, as claimed by plaintiff in error, validates the original assessment, which had been declared void by the Court of Appeals of Maryland, in 72 Md. 587, and are hence invalid.

In answer to this point, the language of Mr. *Justice Gray*, in *Spencer vs. Merchant*, need only be quoted, as the exact objection was raised in the New York case. Mr. *Justice Gray* states the objection, as made in that case, in the following language:

> "He contended that the Statute of 1881 was unconstitutional and void, because it was an attempt by the Legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment."

The learned *Justice* then answers this objection by the following quotation from *Judge Finch's* opinion:

> "*In Re Van Antwerp*, 56 N. Y. 261, an assessment for a street improvement had been declared void by reason of failure to procure necessary consent of property owners. The Legislature made a reassessment, imposing two-thirds of the expense upon a benefited district and one-third upon the city at large. The Act was held valid as a new assessment, and not an effort to validate a void one."

To the same objection made by the plaintiff in error in the Court of Appeals of Maryland, *Judge Boyd*, speaking for the Court, said :

> "It is contended by the appellee that inasmuch as Ordinance No. 100 was declared null and void, the grading, paving and curbing of North avenue were without any legal sanction and void, and that no valid assessment for the cost thereof could consequently be made. The case of *Spencer vs. Merchant*, so frequently cited by us, because we deem it conclusive on many of the points raised in this case, would seem to dispose of that objection." (Record, page 24.)

2. The next point made by the plaintiff in error may be thus stated : That an assessment on only those who had not paid the original assessment, of the balance of the cost of grading, &c., of North Avenue to the extent of the benefits received "is erroneous, and violates the fundamental principle of equity, upon which only can taxation in any form be justified." (Brief, top page 10.) The above complaint of the plaintiff in error is based upon the fact that this unpaid balance was apportioned only among those who had not paid the original assessment to the extent of benefits, and that she was allowed no hearing as to the apportionment of the other part of the said cost among those who had paid the original assessment ; and she relies on the case of *In re Pet. of N. Y. Epis. Pub. Schools*, 75 N. Y., 326, and the dissenting opinion of Mr. *Justice Matthews* in *Spencer vs. Merchant*, to support her claim.

The objection has been fully met in the citations from sundry opinions of this Court elsewhere quoted in this brief. It will be sufficient to repeat a single quotation from *Spencer vs. Merchant*, which is a complete answer to this objection. This Court, in that case says, as to a similar objection made in that case:

> "Unless by special permission, that is a hearing never granted in the process of taxation."

The case relied on in 75 N. Y., 326, to support this contention of the plaintiff in error, does not support her claim. The facts in that case were that the assessors violated the express terms of the law, which required them to assess all the property within the taxing district, according to benefits, for the local improvement. They omitted numerous lots in the district from any assessment. All those lots before whose front flagging solely was placed, were not assessed, although benefited, while those where kerbing, guttering and flagging were placed, were assessed. Flagging was as much a part of the local improvement as the kerbing and guttering. Chief Judge Cranch, who spoke for the Court, says the fault of the assessors was—

> "The rule adopted by the assessors was radically erroneous, and the result reached by them violates the *law under which they acted.*"

The plaintiff in error can receive no support in her contention from the *dissenting* opinion in *Spencer vs. Merchant*, of two of the learned *Justices* of this Court. A dissenting opinion, as a general rule, but helps to emphasize the points on which the majority of the Court differed with the dissentients, or *vice versa*. This is notably so in the case of *Spencer vs. Merchant*. Mr. *Justice Matthews* differs with the majority of the Court. Why? Because he says, in his dissenting opinion:

> "By this Act, therefore, the owners of the lands in question were deprived of the opportunity of being heard upon the question whether the apportionment, as between them and the other landowners, embraced within the original assessment district for the same improvement, was equitable and fair."

It is the opinion and decision of the majority of the Court, which expounds and defines the law for the government of the Courts as well as the people of our country. This opinion of Mr. *Justice Matthews* clearly shows that

this contention of the plaintiff in error, although sanctioned and approved by *Justices Matthews* and *Harlan*, was rejected by the Court.

3. The effort is next made, in the brief of the plaintiff in error, to distinguish the case at bar from the case of *Spencer vs. Merchant*, in the following respects:

(*a.*) In the *Spencer vs. Merchant* case, the plaintiff in error says, in her brief, the Legislature of New York did determine, "absolutely and conclusively, the amount of tax to be raised for the paving of Atlantic avenue, in the town of New Lots, and the property to be assessed, and upon which it was to be apportioned," (brief, top page 11,) while the Maryland Legislature did not so decide in the Act of 1892, chapter 284.

(*b.*) The plaintiff in error assumes, in the next place, without a shadow of authority or justification, that if the facts in the New York case had been the same as in the Maryland case, then this Court would have adopted Mr. *Justice Matthews'* dissenting opinion. (Brief, bottom page 10.)

(*c.*) Then, the plaintiff in error claims that the "*Spencer vs. Merchant* case distinctly draws the distinction between a case where, as in that, the Legislature specifically determines the lands benefited and the amount they are to be assessed for the improvement of a particular street, and the case where the authority is delegated." (Brief, top page 14.)

As to (*a*): The complete answer to this contention is, that it is not a fact that the Act of 1892, chapter 248, leaves the things specified in (*a*) undetermined, every one of them, "the amount of the tax," "the property to be assessed and upon which it is to be apportioned," is definitely and precisely settled by the terms of the Act itself.

Judge Boyd, in referring to the Act of 1892, when meeting and answering the same objection made in the Court of Appeals of Maryland, says:

> "The requirements of the Act are to take the total assessment formerly made for improvements, then deduct the amount paid, and assess the balance on the properties within the defined limits, to the extent that they have been respectively benefited by the improvement. That was as certain as if the Legislature had named a definite sum to be assessed on those who had not paid on North Avenue or any other street where a similar condition of things existed." (Record, pages 23 and 24.)

As to (*b*): The defendants in error submit that the statement set out in (*b*) is an assumption of the learned counsel who wrote the brief, honestly but mistakenly made, and that he is unable to point out an expression of this Court in the opinion in *Spencer vs. Merchant*, to justify the assumption.

As to (*c*): Instead of the opinion of this Court in *Spencer vs. Merchant* drawing a distinction between a case where the Legislature acts and where the Legislature delegates the power to a municipal agent to act, the opinion states the reverse in the following language:

> "The Legislature of the State having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, *although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.*"

The Legislature, by the Act of 1892, chapter 284, fixes, itself, the three things, of—1. Taxing district. 2. All lands in district are benefited, and 3. The amount to be

collected. So that the only delegation of power is for the commissioner to apportion the fixed amount ascertained by the Legislature among those who have not paid the original assessments to the extent of benefits. This is declared in *Spencer vs. Merchant* and the *Irrigation case*, to be perfectly lawful and not to involve a Federal question.

The Act of 1892, chapter 284, expressly provides that after notice and an opportunity to be heard, the assessment on the lot of the plaintiff in error, and others of her class, of the total sum fixed by the Legislature to be collected from the land in the district, shall only be assessed for such an amount as the lots have been benefited by the improvement. The rule fixed in the Act is as follows:

> "To the extent that such property shall have been specially benefited by such improvement."

4. The plaintiff in error concludes her brief with the claim that by reason of her being deprived of the hearing specified in her assignments of error, the law of 1892, chapter 284, is arbitrary and oppressive, and hence, void. A complete answer to this claim is that this Court has repeatedly declared that a law containing the provisions of the Act of 1892, chapter 284, is not arbitrary and oppressive. All of the class named in the taxing district—that is to say, those who have not paid the original assessment, are subjected to the same law and rule of apportionment of taxation.

It is respectfully submitted that the decree of the Court of Appeals of Maryland should be affirmed.

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